(17,912.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 164.

DANIEL H. TALBOT, PLAINTIFF IN ERROR,

vs.

THE FIRST NATIONAL BANK OF SIOUX CITY, IOWA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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1-9 Thereafter, on the 18th day of September, 1895, plaintiff filed his amended and substituted petition as follows:

Amended and Substituted Petition.

Comes now the plaintiff, by leave of court first obtained, and for an amended and substituted petition says:

That the defendant, The First National Bank of Sioux City, Iowa, is a corporation organized and doing business under and by virtue of the laws of the United States relating to national banks, at Sioux City, in Woodbury county, in the State of Iowa, as a banking
10 association, and was so organized and doing business at all the times hereinafter mentioned.

That on the 1st day of January, 1886, the plaintiff had on deposit in the defendant's bank and said bank was indebted to him in the sum of $55.81. That on the 2d day of January, 1886, he drew out by check $69.85, and thereby became indebted to the bank on account in the sum of $13.96; that on the 4th day of January, plaintiff overdrew and became indebted to the bank in the sum of $220.35, and on that day his indebtedness to the bank was in the sum of $234.31; that on the 5th day of January plaintiff overdrew and became indebted to the defendant in the sum of $134.71, and on that day became indebted to the bank in the sum of $369.02; that on the 6th day of January, 1886, plaintiff overdrew and became indebted to the defendant in the sum of $829.15, and on that day became indebted to the bank in the sum of $1,198.17; that on the 7th day of January, 1886, plaintiff overdrew and became indebted to the defendant in the sum of $40.79, and on that day became indebted to the bank in the sum of $1,238.96; that on the 8th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $43.25, and on the same day deposited the sum of $375, and there remained due to the bank the sum of $907.21; that on the 9th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $169.75, and on that day his indebtedness to the bank was $1,076.96; that on the 11th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $100, and on that day his indebtedness to the bank was $1,176.96; that on the 13th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $39.32, and on that day his indebtedness to the bank was $1,216.28; that on the 14th day of January the plaintiff overdrew and became indebted to the defendant in the sum
11 of $566, and on that day his indebtedness to the bank was $1,718.28; that on the 16th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $59.40, and on that day his indebtedness to the bank was $1,841.68; that on the 19th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $795.80, and on that day his

indebtedness to the bank was $2,634.48; that on the 21st day of January the plaintiff overdrew and became indebted to the defendant in the sum of $49.12, and on that day his indebtedness to the bank was $2,683.60; that on the 23d day of January, the plaintiff overdrew and became indebted to the defendant in the sum of $55, and on that day became indebted to the bank $2,738.60; that on the 25th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $10, and on that day his indebtedness to the bank was $2,748.60; that on the 26th day of January plaintiff overdrew and became indebted to the defendant in the sum of $1.75, and on that day his indebtedness to the bank was $2,750.35; that on the 27th day of January, the plaintiff overdrew and became indebted to the defendant in the sum of $130.03, and on that day his indebtedness to the bank was $2,880.38; that on the 28th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $43.75, and on that day his indebtedness to the bank was $2,924.13; that on the 29th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $1,324.20, and on that day his indebtedness to the bank was $4,248.33; that on the 30th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $381.81, and on that day his indebtedness to the bank was $4,630.14; that on February 1, 1886, the plaintiff overdrew and became indebted to the defendant in the sum of $66.85, and on that day his in-
12 debtedness to the bank was $4,696.99; that on the 2d day of February the plaintiff overdrew and became indebted to the defendant in the sum of $247.87, and on that day his indebtedness to the bank was $4,944.86; that on the 3d day of February the plaintiff overdrew and became indebted to the defendant in the sum of $42.73, and on that day his indebtedness to the bank was $4,987.59; that on the 4th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $87.20, and on that day his indebtedness to the bank was $5,074.79; and on that day he made, executed and delivered to the defendant his promissory note for the sum of $5,700, due and payable ninety days after date thereof, and he was indebted to the bank on that day in the sum of $5,075.39; that on the 6th day of February the plaintiff overdrew and became indebted to the bank in the sum of $79.95, and on that day his indebtedness to the bank was in the sum of $5,155.34; that on the 8th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $116.18, and on that day his indebtedness to the bank was $5,271.52; that on the 9th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $65.09, and on that day his indebtedness to the bank was $5,336.61; that on the 11th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $1,182.67, and on that day his indebtedness to the bank was $6,519.28; that on the 12th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $36.93, and on that day his indebtedness to the bank was $6,556.21; that on the 13th day of February the plaintiff overdrew and became indebted

to the defendant in the sum of $111.93, and on that day his indebtedness to the bank was $6,668.14; that on the 16th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $308, and on that day his indebtedness to the bank
13 was $6,976.14; that on said 16th day of February the defendant knowingly computed and charged plaintiff in its account against the plaintiff the sum of $16.50 as and for interest upon the items of indebtedness charged and above stated during the month of January, 1886, and incorporated said charge in its account against the plaintiff, which said interest was at the rate of ten and eighty-two one-hundredths per cent., and which said interest was carried forward in the account between plaintiff and defendant and finally included in the bonds and mortgage hereinafter mentioned and the decree and judgment hereinafter mentioned included said unlawful charge, plaintiff was then indebted to the defendant in the sum of $6,992.64; that on the 18th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $1.50, and on that day his indebtedness to the bank was $6,994.14; that on the 19th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $102.30, and on that day his indebtedness to the bank was $7,096.44; that on the 20th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $28.27, and on that day his indebtedness to the bank was $7,124.71; that on the 22d day of February the plaintiff overdrew and became indebted to the defendant in the sum of $70.85, and on that day his indebtedness to the bank was $7,195.56; on the 25th day of February the plaintiff drew out of said bank the sum of $8.06, and his total indebtedness was then in the sum of $7,203.62, and he paid of the said indebtedness, the sum of $5,725.33, and his indebtedness to the bank was then $1,478.29, and on the same day he deposited with the defendant the sum of $51,410, and he had then deposited in said bank the sum of $8,181.05; that on the 15th day of March, 1886, the defendant knowingly computed and charged plaintiff in its account against the plaintiff the sum of $10.20
14 as and for interest upon the items of overdraft during the month of February, a part of the said indebtedness, and which said charge for interest was at the rate of ten and five one-hundredths per cent. per annum. That on the 15th day of May, 1886, the plaintiff had received from the bank upon his checks all of said sum of $8,181.05, and on that day overdrew and became indebted to said bank in the sum of $740.18; that on the 17th day of May plaintiff overdrew aad became indebted to the defendant in the sum of $72.19, and on that day his indebtedness to the bank was in the sum of $812.37; that on the 18th day of May plaintiff overdrew and became indebted to the bank in the sum of $17.75, and on that day his indebtedness to the bank was $830.12; that on the 19th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $23.31, and on that day his indebtedness to the bank was $853.43; that on the 22d day of May the plaintiff overdrew and became indebted to the bank in the sum of $1.20, and on that day his indebtedness to the bank was $854.63; that on the

24th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $55, he deposited and thereby paid on his indebtedness to said bank the sum of $51, and was then indebted to the bank in the sum of $858.63; that on the 25th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $510, and on that day his indebtedness to the bank was $1,368.63; that on the 26th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $61.39, and on that day his indebtedness to the bank was $1,430.56; that on the 27th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $761.77, and on that day his indebtedness to the bank was $2,192.33; that on the 28th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $85.08, and on the same day paid to the bank by
15 deposit therein the sum of $16.25, leaving his indebtedness to said bank on that day in the sum of $2,261.16; that on the 29th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $10.41, and on that day his indebtedness to the bank was $2,271.57; that on June 1, 1886, the plaintiff overdrew and became indebted to the defendant in the sum of $3,009.55, and on that day his indebtedness to the bank was $5,281.12; that on the 2d day of June the plaintiff overdrew and became indebted to the defendant in the sum of $197.52, and on that day his indebtedness to the bank was $5,478.64; that on the 3d day of June the plaintiff overdrew and became indebted to the defendant in the sum of $288.15, and on that day his indebtedness to the bank was $5,766.79; that on the 4th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $211.65, and on that day his indebtedness to the bank was $5,978.44; that on the 5th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $60.50, and on that day his indebtedness to the bank was $6,038.94; that on the 7th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $11.60, and on that day his indebtedness to the bank was $6,050.54; and on the 8th day of June he deposited and thereby paid to the said bank the sum of $100, and his indebtedness to said bank on that day was in the sum of $5,950.54; that on the 9th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $10.80, and on that day his indebtedness to the bank was $5,961.34; that on the 10th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $9,860.60, and on that day his indebtedness to said bank was $15,821.94; that on said 10th day of June, 1886, plaintiff made, executed, and delivered three certain promissory notes, one
16 for $10,206.66, due ninety days after date; one for $4,109.33, due four months after date; and one for $4,000, due four months after date, and on the same day the plaintiff was credited with a deposit of $18,000, and on that day the bank credited to his account a balance of $2,178.06; that on the 11th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $159.32; that on the 12th day of June the plaintiff overdrew and

became indebted to the defendant in the sum of $513.38; that on the 14th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $47.98; that on the 15th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $78.20; that on the 16th day of June the plaintiff deposited and thereby paid to the said bank the sum of $32; that on the 17th day of June the plaintiff overdrew and became indebted to said bank in the sum of $81.80; that on the 18th day of June the plaintiff overdrew and became indebted to said bank in the sum of $36.55, and on the same day he deposited and thereby paid to the said bank the sum of $100. On the 19th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $243.51, and on the same day deposited and thereby paid to the said bank the sum of $165.45; that on the 21st day of June the plaintiff overdrew and became indebted to said bank in the sum of $20.58; that on the 22d day of June the plaintiff deposited and thereby paid to the said bank the sum of $42.96; that on the 23d day of June the plaintiff overdrew and became indebted to said bank in the sum of $15.45; that on the 25th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $29.10; that on the 26th day of June the plaintiff deposited and thereby paid to the said bank the sum of $40; that on the 28th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $41.63; that on the 29th day of June the plaintiff overdrew and became in-

17 debted to the defendant in the sum of $52; that on the 30th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $8; that on the 1st day of July, 1886, the plaintiff overdrew and became indebted to the defendant in the sum of $45.41; that on the 2d day of July the plaintiff overdrew and became indebted to the defendant in the sum of $60.24; that on the 3d day of July the plaintiff overdrew and became indebted to the defendant in the sum of $155.10, and on the same day deposited and thereby paid to the said bank the sum of $60.02; that on the 6th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $95.61, and on the same day deposited and thereby paid to the said bank the sum of $90; that on the 8th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $14.12; that on the 9th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $488.02; that on the 10th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $62.39; that on the 12th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $348.54; that on the 13th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $301.01, and became indebted to the bank in the sum of $189.45; that on the 14th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $804.77, and on the same day deposited and thereby paid to the said bank the sum of $623.90, leaving an overdraft of $370.32; that on the 15th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $42.50, and on that day his indebtedness

to the bank was $412.82; that on the 16th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $30,
and on that day his indebtedness to the bank was $442.82,
18 and on the same day the defendant knowingly *and* charged
plaintiff in its account against the plaintiff the sum of $13 as and for interest upon the items of overdraft for the month of July, 1886, which said interest was computed at the rate of ten per cent. per annum, and upon said account plaintiff was charged with a balance against him of $455.82; that on the 17th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $25.10, and on that day his indebtedness to the bank was $480.92; that on the 19th day of July plaintiff overdrew and became indebted to the bank in the sum of $257.74, and on that day his indebtedness to the bank was $738.66; that on the 21st day of July the plaintiff overdrew and became indebted to the defendant in the sum of $250, and on that day his indebtedness to the bank was $988.66; that on the 22d day of July the plaintiff overdrew and became indebted to the defendant in the sum of $20.62, and on that day his indebtedness to the bank was $1,009.28; that on the 23d day of July the plaintiff overdrew and became indebted to the defendant in the sum of $2, and on the same day deposited and thereby paid the said bank the sum of $58, and he was thereby indebted to the bank in the sum of $953.28; that on the 25th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $25, and on that day his indebtedness to the bank was $978.28; that on the 26th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $39.73, and on the same day deposited and thereby paid to the said bank the sum of $538, and on that day his indebtedness to the bank was $480.01; that on the 27th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $15.30, and on the same day he deposited and thereby paid to the bank the sum of $1,100.47; that on the 28th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $93.50;
that on the 29th day of July the plaintiff overdrew and
19 became indebted to the defendant in the sum of $1.50;
that on the same day he deposited and thereby paid to the said bank the sum of $80; that on the 31st day of July the plaintiff overdrew and became indebted to the defendant in the sum of $133.50; that on the 2d day of August, 1886, the plaintiff overdrew and became indebted to the defendant in the sum of $203.79, and on the same day the defendant knowingly computed and charged the plaintiff in its account against the plaintiff the sum of $2.65 as and for interest upon the items of said indebtedness, which said interest was at the rate of ten and forty-seven one-hundredths per cent. per annum; that on the 3d day of August the plaintiff overdrew and became indebted to the defendant in the sum of $162.17, and on the same day deposited the sum of $57; that on the 4th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $340.25, and on that day his indebtedness to the bank was $195.20; that on the 5th day of August the plaintiff over-

drew and became indebted to the defendant in the sum of $27.04, and on that day his indebtedness to the bank was $222.24; that on the 7th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $385, and on the same day deposited and thereby paid to said bank the sum of $10, and on that day his indebtedness to the bank was $597.24; that on the 9th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $19.33, and on that day his indebtedness to the bank was in the sum of $616.57; that on the 10th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $4, and on that day his indebtedness to the bank was $620.57; that on the 11th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $21.24, and on that day his indebtedness to the bank was $641.81; that on the 12th day
20 of August the plaintiff overdrew and became indebted to the defendant in the sum of $1, and on that day his indebtedness to the bank was $642.81; that on the 17th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $161, and on that day his indebtedness to the bank was $803.81; that on the 18th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $8, and on that day his indebtedness to the bank was $811.81; that on the 21st day of August the plaintiff overdrew and became indebted to the defendant in the sum of $101.98, and on that day his indebtedness to the bank was $913.79; that on the 23d day of August the plaintiff overdrew and became indebted to the defendant in the sum of $50, and on that day his indebtedness to the bank was $963.79; that on the 24th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $5, and on that day his indebtedness to the bank was $968.79; that on the 25th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $80, and on the same day deposited and thereby paid to the said bank the sum of $17.50, and on that day his indebtedness to the bank was $1,031.29; that on the 27th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $6.64, and on that day his indebtedness to the bank was $1,037.93; that on the 28th day of August the plaintiff deposited and thereby paid to the said bank the sum of $40, and on that day his indebtedness to the bank was $997.93; that on the 30th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $81.86, and on the same day deposited and thereby paid to the said bank the sum of $856.75, and on that day his indebtedness to the bank was $223.04; that on the 31st day of August the plaintiff overdrew and became indebted to the defendant in the sum of $57.73, and on that day his indebtedness to the bank was $280.77; that
21 on the 1st day of September, 1886, the plaintiff overdrew and became indebted to the defendant in the sum of $609.85, and on that day his indebtedness to the bank was $890.62; that on the 2d day of September the plaintiff overdrew and became indebted to the defendant in the sum of $185.57, and on that day his indebtedness to the bank was $1,076.19; that on the 3d day of Sep-

tember the plaintiff overdrew and became indebted to the defendant in the sum of $121.16, and on that day his indebtedness to the bank was $1,197.25; that on the 4th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $29, and on the same day deposited and thereby paid to said bank the sum of $359.37, and on that day his indebtedness to the bank was $866.98; that on the 6th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $19.05, and on the same day deposited and thereby paid to the said bank the sum of $1,647.75; that on the 7th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $69.98; that on the 8th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $25; that on the 9th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $42.10; that on the 10th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $271.75; that on the 11th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $1,128.94, and on that day his indebtedness to the bank was $776.05; that on the 13th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $1.25, and on that day his indebtedness to the bank was $777.30; that on the 14th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $333.80, and on the same day deposited and thereby paid to the said bank the sum of $2,552.21;
22 that on the 16th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $93.96, and on the same day deposited and thereby paid the said bank the sum of $500, and on the same day the defendant knowingly computed and charged the plaintiff in its account against the plaintiff the sum of $5.30 as and for interest upon the items of said indebtedness for the month of August, which said interest was computed at the rate of ten per cent. per annum. That on the 17th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $57.40; that on the 18th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $127.94; that on the 20th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $113.22; that on the 21st day of September the plaintiff overdrew and became indebted to the defendant in the sum of $51.55, and on the 22d day of September the plaintiff overdrew and became indebted to the defendant in the sum of $30; that on the 23d day of September the plaintiff overdrew and became indebted to the defendant in the sum of $4; that on the 25th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $25, and on the same day deposited and thereby paid to said bank the sum of $30; that on the 27th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $44.50; that on the 28th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $33.50; that on the 29th day of September the plaintiff overdrew

and became indebted to the defendant in the sum of $37.31; that on the 2d day of October, 1886, the plaintiff overdrew and became indebted to the defendant in the sum of $48.75, and on the same day deposited the sum of $40; that on the 4th day of October the plaintiff overdrew and became indebted to the defendant in
23 the sum of $109.96; that on the 5th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $224.97; that on the 6th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $172.47; that on the 7th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $45.99; that on the 8th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $72.25; that on the 9th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $202.35; that on the 11th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $19, and on the same day deposited and thereby paid said bank the sum of $69.67; that on the 12th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $20; that on the 13th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $23.85; that on the 14th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $6.95, and on the same day deposited and thereby paid said bank the sum of $36; that on the 15th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $5; that on the 16th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $46.48, and on the same day deposited and thereby paid said bank the sum of $50. That on the 18th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $48.17; that on the 19th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $40.43, and on the same day deposited and thereby paid to said bank the sum of $67.40; that on the 20th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $61.10; that on the 21st day of October the defendant
24 knowingly computed and charged the plaintiff in its account against the plaintiff the sum of $1.10 as and for interest upon items of overdrafts during the month of September, 1886; that on the 22d day of October the plaintiff deposited and thereby paid said bank the sum of $38; that on the 23d day of October the plaintiff overdrew and became indebted to the defendant in the sum of $49.12; that on the 25th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $281.25; that on the 26th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $1,478.09; that on the 30th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $108; that on the 1st day of November, 1886, the plaintiff overdrew and became indebted to the defendant in the sum of $99.60, and on that day his indebtedness to the bank was $37.19; that on the 2d day of November the plaintiff overdrew and became indebted to the defendant in the sum of $38.47, and on the same day

deposited and thereby paid to said bank the sum of $332. That on the 3d day of November the plaintiff overdrew and became indebted to the defendant in the sum of $50; that on the 4th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $126.11; that on the 5th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $570.91, and on that day his indebtedness to the bank was $490.68; that on the 8th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $306.88, and on that day his indebtedness to the bank was $797.56; that on the 9th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $135.20, and on that day his indebtedness to the bank was $932.76; that on the 10th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $20, and on that day his indebtedness to the bank
25 was $952.76; that on the 13th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $72.25, and on that day his indebtedness to the bank was $1,025.01; that on the 15th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $207, and on that day his indebtedness to the bank was $1,232.01; that on the 17th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $46.56, and on that day his indebtedness to the bank was $1,278.57; that on the 19th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $49.67, and on that day his indebtedness to the bank was $1,328.24; that on the 20th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $88.60, and on that day his indebtedness to the bank was $1,416.84; that on the 23d day of November the plaintiff overdrew and became indebted to the defendant in the sum of $22.76, and on that day his indebtedness to the bank was $1,439.60; that on the 24th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $5.50, and on that day his indebtedness to the bank was $1,445.10; that on the 26th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $136, and on the same day deposited and thereby paid said bank the sum of $47, and on that day his indebtedness to said bank was $1,534.10; that on the 27th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $109.66, and on that day his indebtedness to the bank was $1,643.76; that on the 29th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $21.21, and on that day his indebtedness to the bank was $1,664.97; that on the 1st day of December, 1886, the plaintiff overdrew and became indebted to the defendant in the sum of $19.14, and
26 on the same day deposited and thereby paid said bank the sum of $30, and on that day his indebtedness to the bank was $1,654.11; that on the 2d day of December the plaintiff overdrew and became indebted to the defendant in the sum of $14.25, and on that day his indebtedness to the bank was $1,668.36; that on the 3d day of December the plaintiff overdrew and became indebted to the

defendant in the sum of $189.94, and on that day his indebtedness to the bank was $1,858.30; that on the 4th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $59.91, and on that day his indebtedness to the bank was $1,918.21; that on the 6th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $10.71, and on the same day deposited and thereby paid said bank the sum of $100, and on that day his indebtedness to the bank was $1,828.92; that on the 7th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $5, and on that day he deposited and thereby paid said bank the sum of $237.32, and on that day his indebtedness to said bank was $1,596.60; that on the 8th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $5, and on that day his indebtedness to the bank was $1,601.60; that on the 9th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $185, and on that day his indebtedness to the bank was $1,768.60; that on the 10th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $127.71, and on that day his indebtedness to the bank was $1,914.31; that on the 11th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $79.31, and on that day his indebtedness to the bank was $1,993.62; that on the 13th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $25, and on that day his in-
27 debtedness to the bank was $2,018.62; that on the 14th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $61.93, and on that day his indebtedness to the bank was $2,080.55; that on the 15th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $9.33, and on that day his indebtedness to the bank was $2,089.88; that on the 16th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $211.66, and on that day his indebtedness to the bank was $2,301.54; that on the 17th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $26.14, and on that day his indebtedness to the bank was $2,327.68; that on the 18th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $117.83, and on the same day deposited and thereby paid said bank the sum of $16.45, and on the same day the defendant knowingly charged in its account against the plaintiff the sum of $8.45 as and for interest upon the items of said indebtedness for the month of November, which said interest was at the rate of ten and forty-five one-hundredths per cent. per annum, and on that day his indebtedness to the bank was $2,437.51; that on the 20th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $121.11, and on that day his indebtedness to the bank was $2,557.62; that on the 21st day of December the plaintiff overdrew and became indebted to the defendant in the sum of $114.80, and on that day his indebtedness to the defendant was $2,672.42; that on the 22d day of December the plaintiff overdrew and became indebted to the defendant in the sum of $3, and on that

day his indebtedness to the bank was $2,675.42; that on the 23d day of December the plaintiff overdrew and became indebted to the defendant in the sum of $20.05, and on that day his indebt-
28 edness to the bank was $2,695.47; that on the 24th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $69.78, and on the same day deposited and thereby paid said bank the sum of $40, and on that day his indebtedness to said bank was $2,725.25; that on the 27th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $54.49, and on that day his indebtedness to the bank was $2,779.74; that on the 28th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $5.83, and on that day his indebtedness to the bank was $2,785.57; that on the 29th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $5, and on that day his indebtedness to the bank was $2,790.57; that on the 30th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $50.87, and on that day his indebtedness to said bank was $2,841.44; that on the 31st day of December the plaintiff overdrew and became indebted to the defendant in the sum of $58.67, and on that day his indebtedness to the bank was $2,900.11; that on the 3d day of January, 1887, the plaintiff overdrew and became indebted to the defendant in the sum of $81.80, and on that day his indebtedness to the bank was $2,981.91; that on the 4th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $78.04, and on that day his indebtedness to the bank was $3,059.95; that on the 5th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $98.93, and on that day his indebtedness to the bank was $3,158.88; that on the 8th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $176.44, and on the same day deposited the sum of $500, and there remained due the bank the sum of $2,835.32; that on the 10th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $100.12, and on that day his indebtedness to
29 the bank was $2,935.43; that on the 11th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $306.95, and on that day his indebtedness to the bank was $3,242.38; that on the 12th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $44.10, and on that day his indebtedness to the bank was $3,286.48; that on the 13th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $17.25, and on that day his indebtedness to the bank was $3,303.75; that on the 14th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $18.60, and on that day his indebtedness to the bank was $3,322.33; that on the 15th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $573.61, and on that day his indebtedness to the bank was $3,895.94; that on the 17th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $359.85, and on the same

day his indebtedness to the bank was $4,255.79; that on the 18th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $35.51, and on that day his indebtedness to the bank was $4,291.30; that on the 19th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $64.80, and on that day his indebtedness to the bank was $4,356.10; that on the 20th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $9.35, and on that day his indebtedness to the bank was $4,365.45; that on the 21st day of January the plaintiff overdrew and became indebted to the defendant in the sum of $74.87, and on that day his indebtedness to the bank was $4,440.32; that on the 22d day of January the plaintiff overdrew and became indebted to the defendant in the sum of $39.91, and on the same day the defendant knowingly com-
30 puted and charged as and for interest upon items of overdraft during the month of December the sum of $19.52, which said charge was at a greater interest than that allowed by law, and was 10.31 per cent. per annum, and plaintiff thereby became indebted to the defendant as per said account in the sum of $4,499.75; that on the 24th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $92.23, and on that day his indebtedness to the bank was $4,591.98; that on the 25th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $20.87, and on that day his indebtedness to the bank was $4,612.85; that on the 26th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $103.56, and on the same day deposited the sum of $40, and there remained due the bank the sum of $4,676.41; that on the 27th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $66.63, and on the same day deposited the sum of $50, and there remained due the bank the sum of $4,693.04; that on the 28th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $63.71, and on that day his indebtedness to the bank was $4,756.75; that on the 29th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $7.50, and on the same day deposited the sum of $124.80, and there remained due the bank the sum of $4,639.45; that on the 31st day of January the plaintiff overdrew and became indebted to the defendant in the sum of $45.94, and on that day his indebtedness to the bank was $4,685.39; that on the 1st day of February the plaintiff overdrew and became indebted to the defendant in the sum of $79.06, and on or about the same day the defendant knowingly computed and charged as and for interest upon items of overdraft during the month of January the sum of $33, which said
31 charge was at a greater rate of interest than that allowed by law, and was 10.11 per cent. per annum, and on the same day deposited the sum of $4.60, and plaintiff thereby became indebted to the defendant as per said account in the sum of $4,792.86; that on the 2d day of February the plaintiff overdrew and became indebted to the defendant in the sum of $60.97, and on that day his indebtedness to the bank was $4,853.83; that on the 3d day of Feb-

ruary the plaintiff overdrew and became indebted to the defendant in the sum of $513.32, and on that day his indebtedness to the bank was $5,367.15; that on the 4th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $4, and on that day his indebtedness to the bank was $5,371.15; that on the 5th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $186.77, and on that day his indebtedness to the bank was $5,557.27; that on the 7th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $1.25, and on that day his indebtedness to the bank was $5,559.17; that on the 8th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $35, and on that day his indebtedness to the bank was $5,594.17; that on the 9th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $923.90, and on that day his indebtedness to the bank was $6,518.07; that on the 10th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $195.72, and on that day his indebtedness to the bank was $6,713.79; that on the 11th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $240.94, and on that day his indebtedness to the bank was $6,954.73; that on the 12th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $175.49, and on that day his indebtedness to the bank was $7,130.22; that on the 14th day
32 of February the plaintiff overdrew and became indebted to the defendant in the sum of $55.70, and on the same day deposited the sum of $1,641.28, and there remained due the bank the sum of $5,544.64; that on the 15th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $111.47, and on that day his indebtedness to the bank was $5,656.11; that on the 16th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $27.05, and on that day his indebtedness to the bank was $5,683.16; that on the 17th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $10.81, and on that day his indebtedness to the bank was $5,693.97; that on the 18th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $57.61, and on that day his indebtedness to the bank was $5,751.58; that on the 19th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $25.70, and on that day his indebtedness to the bank was $5,777.28; that on the 21st day of February the plaintiff overdrew and became indebted to the defendant in the sum of $15, and on that day his indebtedness to the bank was $5,792.28; that on the 22d day of February the plaintiff overdrew and became indebted to the defendant in the sum of $130.40, and on that day his indebtedness to the bank was $5,922.68; that on the 23d day of February the plaintiff overdrew and became indebted to the defendant in the sum of $10.00, and on that day his indebtedness to the bank was $5,932.48; that on the 25th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $39.10, and on that day his indebted-

ness to the bank was $5,975.38; that on the 24th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $3.60, and on that day his indebtedness to the bank was $5,936.48; that on the 26th day of February the
33 plaintiff overdrew and became indebted to the defendant in the sum of $85.32, and on that day his indebtedness to the bank was $6,060.70; that on the 28th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $91.28, and on that day his indebtedness to the bank was $16,151.98; that on the 1st day of March the plaintiff overdrew and became indebted to the defendant in the sum of $1,170.30, and on that day his indebtedness to the bank was $7,322.28; that on the 2d day of March the plaintiff overdrew and became indebted to the defendant in the sum of $106, and on or about the same day the defendant knowingly computed and charged as and for interest upon items of overdraft during the month of February the sum of $45.72, which said charge was at a greater interest than that allowed by law, and was 10.004 per cent. per annum, and plaintiff thereby became indebted to the defendant as per said account in the sum of $7,474; that on the 4th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $39, and on the same day deposited the sum of $1,028.66, and there remained due the defendant the sum of $6,484.34; that on the 5th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $25.00, and on that day his indebtedness to the bank was $6,509.34; that on the 7th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $51.20, and on the same day deposited the sum of $836.39, and on or about the same day made a further deposit of $1,616.66, and the plaintiff was thereby indebted to the defendant in the sum of $4,707.49; that on the 8th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $327.08, and on that day his indebtedness to the bank was $5,034.57; that on the 9th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $85.40, and on that
34 day his indebtedness to the bank was $5,119.97; that on the 10th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $98.47, and on that day his indebtedness to the bank was $5,218.44; that on the 11th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $316.20, and on that day his indebtedness to the bank was $5,534.64; that on the 12th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $199.87, and on that day his indebtedness to the bank was $5,734.51; that on the 14th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $106.64, and on that day his indebtedness to the bank was $5,841.15; that on the 15th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $108, and on that day his indebtedness to the bank was $5,949.15; that on the 16th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $308.13, and on that day his indebtedness to the bank was $6,257.28; that on the 17th day of

March the plaintiff overdrew and became indebted to the defendant in the sum of $243.14, and on that day his indebtedness was $6,500.42; that on the 18th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $45.15, and on that day his indebtedness to the bank was $6,545.57; that on the 21st day of March the plaintiff overdrew and became indebted to the defendant in the sum of $15, and on that day his indebtedness to the bank was $6,560.57; that on the 22d day of March the plaintiff overdrew and became indebted to the defendant in the sum of $2,359.44, and on that day his indebtedness to the bank was $8,920.81; that on the 23d day of March the plaintiff overdrew and became indebted to the defendant in the sum of $25, and on that day his indebtedness to the bank was $8,945.01; that on the 24th day of
35 March the plaintiff overdrew and became indebted to the defendant in the sum of $14.96, and on that day his indebtedness to the bank was $8,959.97; that on the 25th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $2.31, and on that day his indebtedness to the bank was $8,962.28; that on the 26th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $7.65, and on that day his indebtedness to the bank was $8,969.93; that on the 28th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $152, and on that day his indebtedness to the bank was $9,121.93; that on the 29th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $42, and on that day his indebtedness to the bank was $9,163.93; that on the 31st day of March the plaintiff overdrew and became indebted to the defendant in the sum of $79.67, and on that day his indebtedness to the bank was $9,239.60; that on the 2d day of April the plaintiff overdrew and became indebted to the defendant in the sum of $305.34, and on or about the same the defendant knowingly computed and charged as and for interest upon items of overdraft during the month of March the sum of $63.65, which said charge was at a greater rate of interest than that allowed by law, and was 10.68 per cent. per annum; and plaintiff thereby became indebted to the defendant as per said account in the sum of $9,608.49; that on the 4th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $39.00, and on the same day deposited the sum of $36.00, and there remained due the defendant the sum of $9,611.49; that on the 5th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $5.15, and on that day his indebtedness to the bank was $9,616.64; that
on the 6th day of April the plaintiff overdrew and became
36 indebted to the defendant in the sum of $11, and on that day his indebtedness to the bank was $9,627.64; that on the 7th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $37.40, and on that day his indebtedness to the bank was $9,665.04; that on the 8th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $188.07, and on that day his indebtedness to the bank was $9,853.11; that on the 9th day of April the plaintiff overdrew and became in-

debted to the defendant in the sum of $34.50, and on that day his indebtedness to the bank was $9,887.61; that on the 11th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $136.11, and on the same day deposited the sum of $377.25, and there remained due the defendant the sum of $9,646.47; that on the 12th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $80.45, and on that day his indebtedness to the bank was $9,726.92; that on the 13th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $122.59, and on that day his indebtedness to the bank was $9,849.51; that on the 14th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $258.30, and on that day his indebtedness to the bank was $10,107.81; that on the 15th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $285.82, and on that day his indebtedness to the bank was $10,393; that on the 16th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $21.79, and on that day his indebtedness to the bank was $10,415.42; that on the 18th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $148.17, and on that day his indebtedness to the bank was $10,563.59; that on the 19th day of April the plaintiff overdrew and became indebted to the defendant in the sum of
37 $29.25, and on the same day deposited the sum of $315.00, and there remained due the defendant the sum of $10,277.84; that on the 20th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $95.24, and on that day his indebtedness to the bank was $10,373.08; that on the 21st day of April the plaintiff overdrew and became indebted to the defendant in the sum of $25.78 and on that day his indebtedness to the bank was $10,398.86; that on the 22d day of April, 1887, the plaintiff made, executed and delivered his note to the defendant for the sum of $10,000.00, due and payable ninety days after date, which said note included the above items of overdraft and illegal interest charged upon account, and said note for $10,000.00 was thereafter renewed from time to time until the 17th day of June, 1890, when it entered into and formed part of the debt represented by the bonds hereinafter mentioned and described, and plaintiff was credited upon said account on said 22d day of April, 1887, with $10,000.00, and there remained a balance due the defendant in the sum of $398.86; that on the 23d of April plaintiff deposited $936.00; that on the 25th day of April the plaintiff drew out by check the sum of $289.03; that on the 27th day of April the plaintiff drew out by check the sum of $70.95; that on the 28th day of April the plaintiff drew out by check the sum of $43.03; that on the 29th day of April the plaintiff drew out by check the sum of $16.95; that on the 30th day of April the plaintiff drew out by check the sum of $382.95, and thereby became indebted to the defendant in the sum of $285.31; that on the 2d day of May the plaintiff overdrew and became indebted to the defendant in the sum of $187.41, and — or about the same date the defendant knowingly computed and charged as and

for interest upon items of overdraft during the month of April the sum of $57.94, which said charge was at a greater rate of in-
38 terest than that allowed by law, and was 9.6 per cent. per annum, and plaintiff thereby became indebted to the defendant in the sum of $530.66 as per account; that on the 4th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $52.85, and on that day his indebtedness to the bank was $583.51; that on the 5th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $320, and on that day his indebtedness to the bank was $903.51; that on the 6th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $545, and on that day his indebtedness to the bank was $1,448.51; that on the 7th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $410.55, and on that day his indebtedness to the bank was $1,859.06; that on the 9th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $89.80, and on that day his indebtedness to the bank was $1,948.86; that on the 10th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $234.85, and on the same day deposited the sum of $16.25, and there remained due the defendant the sum of $2,167.46; that on the 11th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $348.96, and on that day his indebtedness to the bank was $2,516.42; that on the 12th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $70.00, and on that day his indebtedness to the bank was $2,586.42; that on the 13th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $106.70, and on that day his indebtedness to the bank was $2,693.12; that on the 14th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $68.16, and on the same day deposited the sum of $135.07, and there remained due the bank the sum of $2,626.21; that on the 16th day of May the plaintiff overdrew and became indebted to the defendant
39 in the sum of $419, and on that day his indebtedness to the bank was $3,045.21; that on the 17th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $86.47, and on that day his indebtedness to the bank was $3,131.68; that on the 18th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $70.89, and on that day his indebtedness to the bank was $3,202.57; that on the 19th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $334.90 and on that day his indebtedness to the bank was $3,537.47; that on the 20th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $67.51, and on that day his indebtedness to the bank was $3,604.98; that on the 21st day of May the plaintiff overdrew and became indebted to the defendant in the sum of $372.75, and on that day his indebtedness to the bank was $3,977.73; that on the 23d day of May the plaintiff overdrew and became indebted to the defendant in the sum of $133.85, and on that day his indebtedness to the bank was $4,111.58; that on the 24th day of May the plaintiff overdrew and became in-

debted to the defendant in the sum of $24.00, and on that day his indebtedness to the bank was $4,135.58; that on the 25th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $119.47, and on that day his indebtedness to the bank was $4,255.05; that on the 26th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $15.95, and on the same day deposited $15, and there remained due the defendant the sum of $4,256. That on the 27th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $2.15, and on that day his indebtedness to the bank was $4,258.15; that on the 28th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $579.57, and on that day his
40 indebtedness to the bank was $4,837.72; that on the 31st day of May the plaintiff overdrew and became indebted to the defendant in the sum of $1,038.25, and on that day his indebtedness to the bank was $5,875.97; that on the 1st day of June the plaintiff overdrew and became indebted to the defendant in the sum of $33.28, and on that day his indebtedness to the bank was $5,949.25; that on the 2d day of June the plaintiff overdrew and became indebted to the defendant in the sum of $19.25, and on the same day deposited the sum of $82.75, and there remained due the defendant the sum of $5,845.75; that on the 3d day of June the plaintiff overdrew and became indebted to the defendant in the sum of $48.16, and on that day his indebtedness to the bank was $5,893.91; that on the 4th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $60.04, and on that day his indebtedness to the bank was $5,953.95; that on the 6th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $26.35, and on that day his indebtedness to the bank was $5,980.30; that on the 7th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $298.80, and on that day his indebtedness to the bank was $6,279.10; that on the 9th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $226.00, and on that day his indebtedness to the bank was $6,505.10; that on the 10th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $178.12, and on that day his indebtedness to the bank was $6,683.22; that on the 11th of June the plaintiff overdrew and became indebted to the defendant in the sum of $99.55, and on that day his indebtedness to the bank was $6.782.77; that on the 13th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $118.04, and on that day his indebtedness to the bank was $6,900.81; that
41 on the 15th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $86.00, and on that day his indebtedness to the bank was $6,986.81; that on the 16th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $12.00, and on that day his indebtedness to the bank was $6,998.81; that on the 17th day of June the defendant knowingly computed and charged as and for interest upon items of overdraft during the month of May the sum of $25.11, which said charge was at a greater rate of interest than that al-

lowed by law, and was 10.72 per cent. per annum, and plaintiff thereby became indebted to the defendant in the sum of $7,023.92; that on the 18th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $586.59, and on that day his indebtedness to the bank was $7,610.51; that on the 20th day of June the plaintiff overdrew and became indebted to the defendant — the sum of $266, and on that day his indebtedness to the bank was $7,876.51; that on the 21st day of June the plaintiff overdrew and became indebted to the defendant in the sum of $108.61, and on that day his indebtedness to the bank was $7,985.12; that on the 22d day of June the plaintiff overdrew and became indebted to the defendant in the sum of $29.65, and on that day his indebtedness to the bank was $8,014.77; that on the 23d day of June the plaintiff overdrew and became indebted to the defendant in the sum of $52.87, and on the same day deposited the sum of $223.70, and there remained due the defendant the sum of $7,843.94; that on the 24th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $96, and on that day his indebtedness to the bank was $7,939.94; that on the 25th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $39.00, and on that day his indebtedness to the bank was
42 $7,978.94; that on the 27th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $76.55, and on that day his indebtedness to the bank was $8,055.49; that on the 28th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $25, and on the same day deposited the sum of $72, and there remained due the defendant the sum of $8,008.49; that on the 29th day of June the plaintiff deposited $98.14, and there remained due the defendant the sum of $7,910.35; that on the 30th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $32.00, and on that day his indebtedness to the bank was $7,942.35; that on the 1st day of July the plaintiff overdrew and became indebted to the defendant in the sum of $127.49, and on that day his indebtedness to the bank was $8,069.84; that on the 2d day of July the plaintiff overdrew and became indebted to the defendant in the sum of $52.25, and on that day his indebtedness to the bank was $8,122.49; that on the 5th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $124.83, and on the same day deposited the sum of $102.50 and there remained due the defendant the sum of $8,144.42; that on the 6th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $364.75, and on that day deposited the sum of $100.00, and there remained due the bank the sum of $8,409.17; that on the 7th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $948.35, and on that day his indebtedness to the bank was $9,357.52; that on the 8th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $92.33, and on that day his indebtedness to the bank was $9,449.85; that on the 9th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $195.75, and on that day his indebt-

edness to the bank was $9,645.60; that on the 11th day of July the plaintiff overdrew and became indebted to the de-
43 fendant in the sum of $106.32, and on that day his indebtedness to the bank was $9,751.92; that on the 12th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $414.60, and on that day his indebtedness to the bank was $10,166.52; that on the 13th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $59.08, and on that day his indebtedness to the bank was $10,225.60; that on the 14th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $8.00, and on that day his indebtedness to the bank was $10,233.60; that on the 15th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $284.72, and on that day his indebtedness to the — was $10,518.32; that on the 16th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $188.27, and on that day his indebtedness to the bank was $10,706.59; that on the .19th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $80.73, and on the same day deposited the sum of $167.50, and there remained due the defendant the sum of $10,619.82; that on the 20th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $75.04, and on the same day deposited the sum of $10.25, and there remained due the defendant the sum of $10,684.61; that on the 21st day of July the plaintiff overdrew and became indebted to the defendant in the sum of $32.67, and on that day his indebtedness to the bank was $10,717.28; that on the 22d day of July the plaintiff overdrew and became indebted to the defendant in the sum of $44.55, and on that day his indebtedness to the bank was $10,761.83; that on the 23d day of July the plaintiff overdrew and became indebted to the defendant in the sum of $155.66, and on that day his indebtedness to the bank was $10,917.49; that on the 25th day of July the plaintiff
44 overdrew and became indebted to the defendant in the sum of $25.07, and on that day his indebtedness to the bank was $10,942.56; that on the 26th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $163.95, and on that day his indebtedness to the bank was $11,106.51; that on the 27th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $90.78, and on that day his indebtedness to the bank was $11,197.29; that on the 28th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $48.89, and on that day his indebtedness to the bank was $11,246.18; that on the 29th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $63.75, and on that day his indebtedness to the bank was $11,309.93; that on the 30th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $27.00, and — or about the same day the defendant knowingly computed and charged as and for interest on items of overdraft during the month of June the sum of $59.00, which said charge was at a greater interest than that allowed by law, and was 10.23 per cent. per annum, and plaintiff thereby became indebted to the de-

fendant in the sum of $11,395.93 as per account. That on the 1st day of August the plaintiff overdrew and became indebted to the defendant in the sum of $88.95, and on that day his indebtedness to the bank was $11,484.88; that on the 2d day of August the plaintiff overdrew and became indebted to the defendant in the sum of $21.00, and on that day his indebtedness to the bank was $11,505.88; that on the 3d day of August the plaintiff overdrew and became indebted to the defendant in the sum of $11,540.75; that on the 8th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $164.00, and on that day his indebtedness to the bank was $11,704.73; that on the 9th day of August the plaintiff overdrew and became indebted to the defendant in the sum
45 of $54, and on that day his indebtedness to the bank was $11,758.73; that on the 10th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $36.62, and on that day his indebtedness to the bank was $11,795.35; that on the 11th day of August the plaintiff overdrew and became indebted to the defendant in the sum *sum* of $68.28, and on that day his indebtedness to the bank was $11,863.63; that on the 12th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $42.95, and on that day his indebtedness to the bank was $11,906.58; that on the 13th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $35.00, and on that day his indebtedness to the bank was $11,941.58; that on the 15th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $72.00, and on that day his indebtedness to the bank was $12,013.58; that on the 16th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $101.90, and on that day his indebtedness to the bank was $12,115.48; that on the 17th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $53.14, and on that day his indebtedness to the bank was $12,168.62; that on the 18th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $549.96, and that day his indebtedness to the bank was $12,718.58; that on the 19th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $34.50, and on that day his indebtedness to the bank was $12,753.08; that on the 20th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $66.47, and on that day his indebtedness to the bank was $12,819.55; that on the 22d day of August the plaintiff overdrew and became indebted to the defendant in the sum of $27.40, and on that
46 day his indebtedness to the bank was $12,846.95; that on the 23d day of August the plaintiff overdrew and became indebted to the defendant in the sum of $29.80, and on that day his indebtedness to the bank was $12,896.75; that on the 26th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $81.10, and on that day his indebtedness to the bank was $12,957.85; that on the 27th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $21.88, and on that day his indebtedness to the bank was $12,979.73; that

on the 29th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $65.05, and on that day his indebtedness to the bank was $13,044.78; that on the 30th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $25.00, and on that day his indebtedness to the bank was $13,069.78; that on the 31st day of August the plaintiff overdrew and became indebted to the defendant in the sum of $55.57, and on the same day the defendant knowingly computed and charged as and for interest upon items of overdraft during the month of July the sum of $87.05, which said charge was at a greater rate of interest than that allowed by law, and was 10.59 per cent. per annum, and plaintiff thereby became indebted to the defendant as per account in the sum of $13,212.40. That on the 1st day of September the plaintiff overdrew and became indebted to the defendant in the sum of $17.20, and on that day his indebtedness to the bank was $13,229.60; that on the 2d day of September the plaintiff overdrew and became indebted to the defendant in the sum of $21.75, and on that day his indebtedness to the bank was $13,251.35; that on the 3d day of September the plaintiff overdrew and became indebted to the defendant in the sum of $50.00, and on that day his indebtedness to the bank was $13,301.35; that on the 5th day of September the plaintiff overdrew and became indebted to the defendant in the
47 sum of $169.27 and on that day his indebtedness to the bank was $13,470.62; that on the 6th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $151.19, and on that day his indebtedness to the bank was $13,621.81; that on the 7th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $44.00, and on that day his indebtedness to the bank was $13,665.81; that on the 8th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $151.95, and on that day his indebtedness to the bank was $13,817.76; that on the 9th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $306.18, and on that day his indebtedness to the bank was $14,123.94; that on the 10th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $23.00, and on that day his indebtedness to the bank was $14,146.94; that on the 12th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $32.50, and on the same day deposited the sum of $1,043.26, and there remained due the defendant the sum of $13,136.18; that on the 14th day of September the plaintiff deposited the sum of $555.75, and there remained due the defendant the sum of $12,580.43; that on the 15th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $88.96, and on that day his indebtedness to the bank was $12,669.39; that on the 17th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $62.41, and on that day his indebtedness to the bank was $12,731.80; that on the 19th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $248.31, and on that day his indebtedness to the bank was $12,980.11; that on the 20th day of September the

plaintiff overdrew and became indebted to the defendant in
48 the sum of $30.50, and on that day his indebtedness to the bank was $13,010.67; that on the 21st day of September the plaintiff overdrew and became indebted to the defendant in the sum of $103.30, and on that day his indebtedness to the bank was $13,113.91; that on the 23d day of September the plaintiff overdrew and became indebted to the defendant in the sum of $2.50, and on that day his indebtedness to the bank was $13,116.41; that on the 24th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $38.23, and on that day his indebtedness to the bank was $13,154.64; that on the 26th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $60.11, and on that day his indebtedness to the bank was $13,214.75; that on the 27th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $21.67, and on that day his indebtedness to the bank was $13,236.42; that on the 28th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $13.20, and on that day his indebtedness to the bank was $13,249.62; that on the 29th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $103.00, and on that day his indebtedness to the bank was $13,352.62; that on the 30th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $20.00, and on or about the same day the defendant knowingly computed and charged as and for interest upon items of overdraft during the month of August the sum of $106.20, which said interest was at a greater rate of interest than that allowed by law, and was for 10.25 per cent. per annum; that on the same day plaintiff made, executed and delivered to the defendant his note for the sum of $10,000.00, due and payable in ninety days after date, which said note included the above items of overdrafts and illegal interest charged upon account, and said note for $10,000.00 was thereafter renewed from time
49 to time until the 17th day of June, 1890, when it entered into and formed a part of the debt represented by the bonds hereinafter mentioned and described, and the plaintiff was credited upon said account on said 30th day of September, 1887, with $10,000.00, and on that day there remained a balance due the defendant in the sum of $3,478.82; that on the 1st day of October the plaintiff overdrew and became indebted to the defendant in the sum of $349.23, and on that day his indebtedness to the bank was $3,828.05; that on the 3d day of October the plaintiff overdrew and became indebted to the defendant in the sum of $4.00, and on that day his indebtedness to the bank was $3,832.05; that on the 4th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $28.00, and on that day his indebtedness to the bank was $3,860.05; that on the 5th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $65.57, and on that day his indebtedness to the bank was $3,925.62; that on the 6th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $46.78, and on that day his indebtedness to the bank was $3,972.40; that on the 8th day of Oc-

tober the plaintiff overdrew and became indebted to the defendant in the sum of $72.75, and on that day his indebtedness to the bank was $4,045.15; that on the 11th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $12.00, and on the same day deposited the sum of $100.50, and there remained due the defendant the sum of $3,956.65; that on the 12th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $42.95, and on that day his indebtedness to the bank was $3,999.60; that on the 13th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $12.00, and on that day his indebtedness to the bank was
50 $4,012.60; that on the 14th day of October the plaintiff deposited the sum of $59.00, and there remained due the defendant the sum of $3,852.60; that on the 15th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $95.18, and on that day his indebtedness to the bank was $4,047.78; that on the 17th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $374.84, and on the same day deposited the sum of $36.00, and there remained due the defendant the sum of $4,386.62; that on the 18th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $92.50, and on that day his indebtedness to the bank was $4,479.12; that on the 19th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $4.17, and on that day his indebtedness to the bank was $4,483.29; that on the 20th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $99.70, and on that day his indebtedness to the bank was $4,582.99; that on the 21st day of October the plaintiff overdrew and became indebted to the defendant in the sum of $2,024.92, and on that day his indebtedness to the bank was $6,607.91; that on the 22d day of October the plaintiff overdrew and became indebted to the defendant in the sum of $60.00, and on that day his indebtedness to the bank was $6,667.91; that on the 23d day of October the plaintiff overdrew and became indebted to the defendant in the sum of $824.88, and on the same day deposited the sum of $500.00, and there remained due the defendant the sum of $6,992.79; that on the 25th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $19.00, and on that day his indebtedness to the bank was $7,011.79; that on the 27th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $58.30, and on that day his indebtedness to the bank was $7,070.09; that on the 28th day of
51 October the plaintiff overdrew and became indebted to the defendant in the sum of $24.87, and on that day his indebtedness to the bank was $7,094.96; that on the 29th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $95.07, and on that day his indebtedness to the bank was $7,190.03; that on the 31st day of October the plaintiff overdrew and became indebted to the defendant in the sum $265.11, and on that day his indebtedness to the bank was $7,455.14; that on the 1st day of November the plaintiff overdrew and became indebted

to the defendant in the sum of $88.70, and on that day his indebtedness to the bank was $7,543.84; that on the 2d day of November the plaintiff overdrew and became indebted to the defendant in the sum of $61.00, and on that day his indebtedness to the bank was $7,604.84; that on the 3d day of November the plaintiff overdrew and became indebted to the defendant in the sum of $383.28, and on that day his indebtedness to the bank was $7,988.12; that on the 4th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $80.10, and on that day his indebtedness to the bank was $8,068.22; that on the 5th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $139.23, and on the same day deposited the sum of $118.35, and there remained due the defendant the sum of $8,089.10; that on the 7th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $214.79, and on the same day deposited the sum of $2,000, and there remained due the defendant the sum of $6,303.89; that on the 8th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $50.69, and on that day his indebtedness to the bank was $6,354.58; that on the 9th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $328.04, and on that
52 day his indebtedness to the bank was $6,682.68; that on the 10th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $177.90, and on that day his indebtedness to the bank was $6,860.62; that on the 11th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $68.85, and on that day his indebtedness to the bank was $6,930.27; that on the 12th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $83.75, and on that day his indebtedness to the bank was $7,014.12; that on the 14th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $10,140.00, and on that day his indebtedness to the bank was $17,154.12; that on the 15th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $258.00, and on the same day deposited the sum of $342.00, and there remained due the defendant the sum of $17,070.12; that on the 16th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $269.27, and on that day his indebtedness to the bank was $17,339.39; that on the 17th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $67.62, and on that day his indebtedness to the bank was $17,407.01; that on the 18th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $177.75, and on the same day deposited the sum of $96, and there remained due the defendant the sum of $17,488.76; that on the 19th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $29.50, and on the same day deposited the sum of $420, and there remained due the defendant the sum of $17,098.06; that on the 21st day of November the plaintiff overdrew and became indebted to the defendant in the sum of $121, and on that day his indebtedness to the bank was

$17,219.06; that on the 22d day of November the plaintiff over-
53 drew and became indebted to the defendant in the sum of $255.39, and on the same day deposited the sum of $15.00, and there remained due the defendant the sum of $17,459.45; that on the 23d day of November the plaintiff overdrew and became indebted to the defendant in the sum of $101.74, and on that day his indebtedness to the bank was $17,561.19; that on the 25th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $317.21, and on that day his indebtedness to the bank was $17,878.40; that on the 26th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $49.35, and on that day his indebtedness to the bank was $17,927.75; that on the 28th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $123.84, and on that day his indebtedness to the bank was $18,051.59; that on the 29th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $83.80, and on that day his indebtedness to the bank was $18,135.39; that on the 30th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $62.45, and on or about the same day the defendant knowingly computed and charged as and for interest upon items of overdraft during the month of September the sum of $108.47, which said charge was at a greater interest than that allowed by law, and was at 9.9 per cent. per annum; that on or about the same day the defendant knowingly computed and charged as and for interest upon items of overdraft during the month of October the sum of $43.89, which said charge was at a greater rate of interest than that allowed by law, and was 10.37 per cent. per annum, and plaintiff thereby became indebted to the defendant as per account in the sum of $18,350.20. That on the 1st day of December the plaintiff overdrew and became indebted to the defendant in the sum of $384.40, and on that day his indebtedness to the
54 bank was $18,734.60; that on the 2d day of December the plaintiff overdrew and became indebted to the defendant in the sum of $145.56, and on that day his indebtedness to the bank was $18,880.16; that on the 3d day of December the plaintiff overdrew and became indebted to the defendant in the sum of $355.13, and on that day his indebtedness to the bank was $19,235.29; that on the 5th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $360.86, and on that day his indebtedness to the bank was $19,596.15; that on the 6th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $127.92, and his indebtedness on that day to the bank was $19,724.07; that on the 7th day of December the plaintiff overdrew and became indebted to the defendant in the sum — $120.00, and on that day his indebtedness to the bank was $19,844.07; that on the 8th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $289.65, and on that day his indebtedness to the bank was $20,133.72; that on the 9th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $329.12, and on the same day

deposited the sum of $2,596.10, and there remained due the defendant the sum of $17,866.74; that on the 10th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $323.44, and on that day his indebtedness to the bank was $18,190.18; that on the 12th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $192.10, and on that day his indebtedness to the bank was $18,382.28; that on the 13th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $38.25, and on that day his indebtedness to the bank was $18,420.53; that on the 14th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $351.14, and on that day his indebt-
55 edness to the bank was $18,771.67; that on the 15th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $19,043.64; that on the 16th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $447.78, and on that day his indebtedness to the bank was $19,491.42; that on the 17th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $269.89, and on that day his indebtedness to the bank was $19,761.31; that on the 19th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $510.02, and on that day his indebtedness to the bank was $20,271.33; that on the 20th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $127.33, and on that day his indebtedness to the bank was $20,398.66; that on the 21st day of December the plaintiff overdrew and became indebted to the defendant in the sum of $61, and on that day his indebtedness to the bank was $20,459.66; that on the 22d day of December the plaintiff overdrew and became indebted to the defendant in the sum of $18.95, and on that day his indebtedness to the bank was $20,478.61; that on the 23d day of December the plaintiff overdrew and became indebted to the defendant in the sum of $109.50, and on that day his indebtedness to the bank was $20,588.11; that on the 24th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $253.16, and on that day his indebtedness to the bank was $20,841.27; that on the 27th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $79.15, and on that day his indebtedness to the bank was $20,920.42; that on the 28th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $111.52, and on that day his indebtedness to the bank was $21,031.94; that on the 29th day of Decem-
56 ber the plaintiff overdrew and became indebted to the defendant in the sum of $148.23, and on that day his indebtedness to the bank was $21,180.17; that on the 30th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $46.05, and on that day his indebtedness to the bank was $21,226.22; that on the 31st day of December the plaintiff overdrew and became indebted to the defendant in the sum of $39.65, and on that day his indebtedness to the bank was $21,265.87; that on the 3d day of January, 1888, the plaintiff overdrew and became

indebted to the defendant in the sum of $125.09, and on that day his indebtedness to the bank was $21,390.96; that on the 4th day of January, 1888, the plaintiff overdrew and became indebted to the defendant in the sum of $191.54, and on that day his indebtedness to the bank was $21,582.50; that on the 5th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $136.63, and on that day his indebtedness to the bank was $21,719.13; that on or about the 6th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $271.25, and on that day the plaintiff's indebtedness to the bank was $21,990.38; that on or about the 6th day of January the plaintiff overdrew and became indebted to the defendant in the sum — $157.52, and on that day his indebtedness to the bank was $22,147.90; that on the 9th day of January the plaintiff overdrew and became indebted to the defendant in the sum — $308.10, and on that day his indebtedness to the bank was $22,456; that on the 10th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $333.25, and on that day his indebtedness to the bank was $22,789.25; that on the 11th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $313.62, and on that day his indebtedness to the bank was $23,012.87; that on the 12th day of January the plaintiff overdrew and became indebted to the defendant in
57 the sum of $68.20, and on that day his indebtedness to the bank was $23,171.07; that on the 14th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $50.09, and on that day his indebtedness to the bank was $23,221.16; that on the 16th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $93.89, and on that day his indebtedness to the bank was $23,315.05; that on the 17th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $110.15, and on that day his indebtedness to the bank was $23,425.20; that on the 18th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $95.20, and on that day his indebtedness to the bank was $23,520.40; that on the 19th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $16.00, and on that day his indebtedness to the bank was $23,536.40; that on the 20th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $27.52, and on that day his indebtedness to the bank was $23,563.92; that on the 21st day of January the plaintiff overdrew and became indebted to the defendant in the sum of $75.75, and on that day his indebtedness to the bank was $23,639.67; that on the 23d day of January the plaintiff overdrew and became indebted to the defendant in the sum of $324.75, and on that day his indebtedness to the bank was $23,964.42; that on the 24th day of January the plaintiff overdrew and became indebted to the defendant in the sum — $112.99, and on that day his indebtedness to the bank was $24,077.41; that on the 25th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $539.19, and on that day his indebtedness to the bank was

$24,616.60; that on the 26th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $18.00,
58 and on that day his indebtedness to the bank was $24,634.60; that on the 27th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $226.71, and on that day his indebtedness to the bank was $24,861.31; that on the 28th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $218.44, and on that day his indebtedness to the bank was $25,079.75; that on the 30th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $111.93, and on that day his indebtedness to the bank was $25,191.68; that on the 31st day of January the plaintiff overdrew and became indebted to the defendant in the sum of $134.00, and on or about the same day the defendant computed and charged plaintiff in its account against the plaintiff the sum of $110 as and for interest upon the items of overdraft during the month of November, which interest was computed at the rate of 10.5, and on or about the same day the defendant knowingly computed and charged the plaintiff in its account against the plaintiff the sum of $170.19 as and for interest upon the items of overdraft during the month of December, which interest was computed at the rate of 10.17, and on that day plaintiff's indebtedness to the bank as per account was $25,615.87; that on the 1st day of February, 1888, the plaintiff overdrew and became indebted to the defendant in the sum of $24.31, and on that day his indebtedness to the bank was $25,640.18; that on the 2d day of February the plaintiff overdrew and became indebted to the defendant in the sum of $118.60, and on that day his indebtedness to the bank was $25,758.78; that on the 3d day of February the plaintiff overdrew and became indebted to the defendant in the sum of $696.66, and on that day his indebtedness to the bank was $26,449.44; that on the 4th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $115.51, and on that day his indebtedness to the bank was $26,564.95; that on
59 the 6th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $167.32, and on that day his indebtedness to the bank was $26,732.27; that on the 7th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $205.86, and on that day his indebtedness to the bank was $20,938.13; that on the 8th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $134.21, and on that day his indebtedness to the bank was $27,072.34; that on the 9th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $22.96, and on that day his indebtedness to the bank was $27,095.30; that on the 10th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $10.00, and on that day his indebtedness to the bank was $27,105.30; that on the 11th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $128.00, and on that day his indebtedness to the bank was $27,233.30; that on the 13th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $527, and on

that day his indebtedness to the bank was $27,760.30; that on the 14th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $147.00, and on that day his indebtedness to the bank was $27,907.30; that on the 15th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $184.60, and on that day his indebtedness to the bank was $28,091.90; that on the 16th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $107.29, and on that day his indebtedness to the bank was $28,199.19; that on the 17th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $73.80, and on that day his indebtedness to the bank was $28,272.99; that on the 18th
60 day of February the plaintiff overdrew and became indebted to the defendant in the sum of $190.80, and on that day his indebtedness to the bank was $28,463.79; that on the 20th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $256.65, and on that day his indebtedness to the bank was $28,720.44; that on the 21st day of February the plaintiff overdrew and became indebted to the defendant in the sum of $363.72, and on that day his indebtedness to the bank was $29,084.16; that on the 22d day of February the plaintiff overdrew and became indebted to the defendant in the sum of $18.00, and on that day his indebtedness to the bank was $29,102.16; that on the 23d day of February the plaintiff overdrew and became indebted to the defendant in the sum of $296.03, and on that day his indebtedness to the bank was $29,398.19; that on the 24th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $100.24, and on that day his indebtedness to the bank was $29,498.43; that on the 25th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $62.69, and on the same day deposited and thereby paid said bank the sum of $489.68, and on that day his indebtedness to the bank was $29,071.44; that on the 27th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $665.28, and on that day his indebtedness to the bank was $29,737.32; that on the 28th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $265.62, and on that day his indebtedness to the bank was $30,002.94; that on the 29th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $539.27, and on that day his indebtedness to the bank was $30,542.21; that on the 1st day of March, 1888, the plaintiff overdrew and became indebted to the defendant in the sum of $23.56, and on that day his indebtedness to the bank was $30,565.77; that on the 2d day of March the
61 plaintiff overdrew and became indebted to the defendant in the sum of $191.83, and on that day his indebtedness to the bank was $30,757.60; that on the 3d day of March the plaintiff overdrew and became indebted to the defendant in the sum of $602.94, and on that day his indebtedness to the bank was $31,360.54; that on the 5th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $66.67, and on that day his

indebtedness to the bank was $31,427.21; that on the 6th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $444.83, and on that day his indebtedness to the bank was $31,872.04; that on the 7th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $290.96, and on the same day deposited and thereby paid said bank the sum of $308.41, and on that day his indebtedness to said bank was $31,854.59; that on the 8th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $705.11, and on that day his indebtedness to said bank was $32,559.70; that on the 9th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $33.38, and on that day his indebtedness to said bank was $32,593.08; that on the 10th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $50.40, and on that day his indebtedness to the bank was $32,643.48; that on the 12th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $385.12, and on that day his indebtedness to the bank was $33,028.60; that on the 13th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $352.56, and on that day his indebtedness to the bank was $33,281.16; that on the 14th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $102.41, and on the same day deposited and
62 thereby paid said bank the sum of $731.85, and on that day his indebtedness to the bank was $32,651.72; that on the 15th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $48.80, and on that day his indebtedness to the bank was $32,700.52; that on the 16th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $63.35, and on that day his indebtedness to the bank was $32.763.87; that on the 17th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $305.28, and on that day his indebtedness to the bank was $33,070.15; that on the 19th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $92.00, and on that day his indebtedness to the bank was $33,162.15; that on the 20th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $294.96, and on that day his indebtedness to the bank was $33,457.11; that on the 21st day of March the plaintiff overdrew and became indebted to the defendant in the sum of $14.66, and on that day his indebtedness to the bank was $33,471.77; that on the 22d the plaintiff overdrew and became indebted to the defendant in the sum of $89.62, and on that day his indebtedness to the bank was $33,561.39; that on the 23d day of March the plaintiff overdrew and became indebted to the defendant in the sum of $87.99, and on that day his indebtedness to the bank was $33,649.37. On the 23d day of March the plaintiff with certain notes and mortgages due him paid the defendant on his indebtedness the sum of $8,279.61, and on the same day made, executed and delivered his promissory note to the defendant, due sixty days thereafter, for the sum of $2,500, and on the same day one E. E. Lewis, for the accommodation of the plain-

tiff, made, executed and delivered his promissory note due ninety days after date, for the sum of $10,000, and on the same day one George P. Day, made, executed and delivered his note for
63 the accommodation of the plaintiff for the sum of $10,000, due three months after date, and on or about the same day one A. L. Hudson made, executed and delivered his note for the accommodation of the plaintiff in the sum of $8,000, due sixty days after date, and on the same day the plaintiff made, executed and delivered his certain contract of that date for the sum of $5,800, due to the defendant and the defendant for its purposes and without reference to the real intent of the parties to the transaction entered upon its books a credit to the plaintiff in the sum of $—, no part of which, however, was actually paid except the sum of $8,279.61 so as aforesaid paid, and his account as kept by the defendant disregarding the true state and condition of the account between them, was made to show a balance in favor of the plaintiff in the sum of $594.20, and on the same day, for the accommodation of the bank, plaintiff made, executed and delivered his note of that date for the sum of $9,340.60, due and payable ninety days thereafter, and on the same day, under the direction of the defendant, made, executed and delivered his check for the same amount.

That on the 26th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $88.97; that on the 27th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $119.27; that on the 28th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $5, and on the 29th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $103.84; on the 30th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $297.19, and on that day his indebtedness to the bank was $20.07; that on the 31st day of March the plaintiff overdrew and became indebted to the defendant in the sum of $97.96, and on that day his indebtedness to the bank was
64 $118.03; that on the 2d day of April, 1888, the plaintiff overdrew and became indebted to the defendant in the sum — $27.00, and on that day his indebtedness to the bank was $105.03; that on the 3d day of April the plaintiff overdrew and became indebted to the defendant in the sum of $51.28, and on that day his indebtedness to the bank was $196.31; that on the 4th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $63.05, and on that day his indebtedness to the bank was $259.36; that on the 5th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $43.75, and on that day his indebtedness to the bank was $303.11; that on the 6th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $143.49, and on that day his indebtedness to the bank was $446.60; that on the 7th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $256.04, and on that day his indebtedness to the bank was $702.64; that on the 9th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $85.80, and on that day his indebted-

ness to the bank was $788.44; that on the 10th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $230.10, and on that day his indebtedness to the bank was $1,018.54; that on the 11th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $95.50, and on that day his indebtedness to the bank was $1,114.04; that on the 12th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $30.69, and on that day his indebtedness to the bank was $1,144.73; that on the 13th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $64.68, and on that day his indebtedness to the bank was $1,209.41; that on the 14th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $105.81, and on that day his indebt-
65 edness to the bank was $1,315.22; that on the 16th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $126.91, and on that day his indebtedness to the bank was $1,442.13; that on the 17th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $281.60, and on that day his indebtedness to the bank was $1,723.73; that on the 18th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $65.56, and on that day his indebtedness to the bank was $1,789.29; that on the 19th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $82.66, and on the same day deposited and thereby paid said bank the sum of $1,890.92, and on the 20th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $38.55, and on that day his indebtedness to the bank was $19.58; that on the 21st day of April the plaintiff overdrew and became indebted to the defendant in the sum of $329.20, and on that day his indebtedness to the bank was $348.78; that on the 23d day of April the plaintiff overdrew and became indebted to the defendant in the sum of $329.96, and on that day his indebtedness to the bank was $678.74; that on the 24th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $136.34, and on that day his indebtedness to the bank was $815.08; that on the 25th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $27.67, and on that day his indebtedness to the bank was $842.75; that on the 26th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $203, and on that day his indebtedness to the bank was $1,045.75; that on the 27th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $200, and on that day his indebtedness to the bank was $1,245.75; that on the 28th day
66 of April the plaintiff overdrew and became indebted to the defendant in the sum of $21.29, and on that day his indebtedness to the bank was $1,267.04; that on the 30th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $77.69, and on that day his indebtedness to the bank was $1,344.73; that on the 2d day of May, 1888, the plaintiff overdrew and became indebted to the defendant in the sum of $167.41, and on that day his indebtedness to the bank was $1,512.14; that on the

4th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $31.85, and on that day deposited and thereby paid to said bank the sum of $859.85, and on that day his indebtedness to said bank was $90.21; that on the 5th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $263.27, and on the same day deposited and thereby paid to said bank the sum of $271.00, and on that day his indebtedness to the bank was $682.48; that on the 7th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $118.18, and on that day his indebtedness to the bank was $800.66; that on the 8th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $46.26, and on the same day deposited and thereby paid said bank the sum of $180, and on that day his indebtedness to said bank was $666.92; that on the 9th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $20.02, and on that day his indebtedness to the bank was $686.92; that on the 10th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $72.45, and on that day his indebtedness to the bank was $759.37; that on the 11th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $167.67, and on the same day deposited and thereby paid to said bank the sum of $58.50, and on that day his indebtedness to said bank was $868.54;

67 that on the 12th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $108, and on that day the plaintiff was indebted to the bank in the sum of $976.54; that on the 14th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $453.88, and on the same day deposited and thereby paid to said bank the sum of $28.87, and on that day his indebt-ness to said bank was $1,401.55; that on the 15th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $87.76, and on that day his indebtedness to said bank was $1,489.31; that on the 16th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $248.74, and on that day his indebtedness to the bank was $1,738.05; that on the 17th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $135.57, and on that day his indebtedness to the bank was $1,873.62; that on the 22d day of May the plaintiff overdrew and became indebted to the defendant in the sum of $25.57, and on the same day deposited and thereby paid said bank the sum of $9,078.89; that on the 23d day of May the plaintiff overdrew and became indebted to the defendant in the sum of $125.75; that on the 24th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $775.05; on the 25th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $24.85; that on the 26th day of May the plaintiff overdrew and became indebted to the defendant in the sum — $185.10, and on the same day deposited and thereby paid said bank the sum of $502.80; that on the 28th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $73.59; that on the 29th day of May the plaintiff overdrew and be-

came indebted to the defendant in the sum — $309.51, and on the same day deposited and thereby paid said bank the sum of
68 $211; that on the 31st day of May the plaintiff overdrew and became indebted to the defendant in the sum of $183.76, and on the same day the defendant knowingly computed and charged the plaintiff in its account against the plaintiff the sum of $202.16 as and for interest on overdrafts during the month of January which said interest was computed at the rate of 10.835 per cent., and on the same day the defendant knowingly computed and charged the plaintiff in its account against the plaintiff the sum of $225.50 as and for interest upon items of overdraft during the month of February, which interest was computed at the rate of 10.02 per cent., and on the same day the defendant knowingly computed and charged plaintiff in its account against the plaintiff the sum of $207.97 as and for interest upon the items of overdraft during the month of March, which said interest was computed at the rate of 9.75 per cent., and on the same day the defendant knowingly computed and charged plaintiff in its account against the plaintiff the sum of $6.93, as and for interest upon the items of overdraft during the month of April, which said interest was computed at the rate of 10.66 per cent., leaving a balance due his credit on that day as per said account in the sum of $5,572.23. That on June 1st, 1888, the plaintiff overdrew and became indebted to the defendant in the sum of $61.77; that on the 2d day of June the plaintiff overdrew and became indebted to the defendant in the sum of $258.74; that on the 4th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $208.65; that on the 5th day of June the plaintiff overdrew and became indebted to the defendant in the sum — $211.70; that on the 6th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $30.75; that on the 7th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $99.64; that on the 8th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $67.85; that on the
69 9th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $49.71; that on the 11th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $25; that on the 12th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $20.01; that on the 13th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $147.45; that on the 14th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $671.57; that on the 15th day of June the plaintiff overdrew and became indebted to defendant in the sum of $208.94; that on the 16th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $315.70; that on the 18th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $183.76; that on the 19th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $937.42; that on the 20th day of June the plaintiff overdrew and became indebted to the defendant in the sum of

$46.05; that on the 21st day of June the plaintiff overdrew and became indebted to the defendant in the sum of $540.32; that on the 22d day of June the plaintiff overdrew and became indebted to the defendant in the sum of $35.39; that on the 24th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $116; that on the 25th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $45.40; that on the 26th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $13; that on the 27th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $17.05; that on the 28th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $17.64; that on the 29th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $29.85; that on the 30th day
70 of June the plaintiff overdrew and became indebted to the defendant in the sum of $23.49, and on the same day the defendant knowingly computed and charged the plaintiff in its account against the plaintiff the sum of $8.50 as and for interest upon the items of overdraft during the month of May, which said interest was at the rate of 17.03 per cent. That on the 3d day of July, 1888, the plaintiff overdrew and became indebted to the defendant in the sum of $152.26; and on the 5th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $247.69; that on the 6th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $168.98; that on the 7th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $771.24; that on the 9th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $121.90, and on that day his indebtedness to the bank was $68.05; that on the 10th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $110.35, and on that day his indebtedness to the bank was $178.40; that on the 11th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $128.84, and on that day his indebtedness to the bank was $300.24; that on the 12th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $72.41, and on that day his indebtedness to the bank was $372.65; that on the 16th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $181.82, and on that day his indebtedness to the bank was $554.47; that on the 18th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $10,274.48, and on that day his indebtedness to the bank was $10,828.95; that on the 19th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $514.07, and on the same day deposited the sum of and thereby paid
71 said bank $13,269.39, leaving a balance to his credit of $1,926.37; that on the 20th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $591.90; that on the 21st day of July the plaintiff overdrew and became indebted to the defendant in the sum of $33.20, and on the same day deposited and thereby paid said bank the sum of $45.70; that on

the 23d day of July the plaintiff overdrew and became indebted to the defendant in the sum of $156.50; that on the 24th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $368.59; that on the 25th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $17.01; that on the 27th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $36; that on the 28th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $283.46; that on the 30th day of July the plaintiff overdrew and became indebted to the defendant in the sum of $77.53, and on the same day deposited and thereby paid said bank the sum of $926.12; that on the 31st day of July the plaintiff overdrew and became indebted to the defendant in the sum of $156.59; that on the 1st day of August the plaintiff became indebted to the defendant in the sum of $25.47; that on the 2d day of August the plaintiff became indebted to the defendant in the sum of $340.13; that on the 3d day of August the plaintiff became indebted to the defendant in the sum of $108.10; that on the — day of August the plaintiff became indebted to the defendant in the sum of $163.66; that on the 10th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $423.38, and on that day his indebtedness to the bank was $113.33; that on the 11th day of August the defendant computed and charged as and for interest upon items of overdraft during the month of July the sum of $1, which
72 said charge was at a greater interest than that allowed by law, and was 2.6 per cent. per annum, and plaintiff thereby became indebted to the defendant in the sum of $114.33; that on the 13th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $13.30, and his indebtedness to the bank on that day was $127.63; that on the 15th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $258.28, and on that day his indebtedness to the bank was $385.91; that on the 17th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $30.00, and on that day his indebtedness to the bank was $415.11; that on the 18th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $82.98, and on that day his indebtedness to the bank was $498.89; that on the 20th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $36.00, and on the same day deposited the sum of $400.00, and there remained due the defendant the sum of $134.89; that on the 21st day of August the plaintiff overdrew and became indebted to the defendant in the sum of $1,024.38, and on that day his indebtedness to the bank was $1,159.27; that on the 22d day of August the plaintiff overdrew and became indebted to the defendant in the sum of $43.97, and on that day his indebtedness to the bank was $1,203.24; that on the 25th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $32.05, and on that day his indebtedness to the bank was $1,235.29; that on the 27th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $535.81, and on that day his indebtedness to

the defendant was $1,771.10; that on the 30th day of August the plaintiff overdrew and became indebted to the defendant in the sum of $27.73, and on that day his indebtedness to the bank was $1,798.83; that on the 31st day of August the
73 plaintiff overdrew and became indebted to the defendant in the sum of $553.98, and on that day his indebtedness to the bank was $2,352.81; that on the 1st day of September the plaintiff overdrew and became indebted to the defendant in the sum of $75.35, and on that day his indebtedness to the bank was $2,428.16; that on the 3d day of September the plaintiff overdrew and became indebted to the defendant in *in* the sum of $30.64, and on that day his indebtedness to the bank was $2,458.80; that on the 4th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $408.10, and on that day his indebtedness to the defendant was $2,866.90; that on the 5th day of September the plaintiff overdrew and became indebted to defendant in the sum of $58.67, and on that day his indebtedness to the bank was $2,925.57; that on the 6th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $88.37, and on that day his indebtedness to the bank was $3,013.94; that on the 7th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $25.00, and on that day his indebtedness to the bank was $3,038.94; that on the 8th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $42.40, and on that day his indebtedness to the bank was $3,081.34; that on the 10th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $118.39, and on that day his indebtedness to the bank was $3,199.73; that on the 11th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $21.67, and on that day his indebtedness to the bank was $3,221.40; that on the 12th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $38.60, and on that day his indebtedness to the bank was
$3,260.00; that on the 14th day of September the plaintiff
74 overdrew and became indebted to the defendant in the sum of $2.79, and on that day his indebtedness to the bank was $3,262.79; that on the 15th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $28.37, and on that day his indebtedness to the bank was $3,291.16; that on the 17th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $12.67, and on that day his indebtedness to the bank was $3,303.83; that on the 18th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $213.20, and on the same day deposited the sum of $84.95, and there remained due the defendant in the sum of $3,432.08; that on the 19th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $100, and on that day his indebtedness to the bank was $3,532.08; that on the 20th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $10, and on that day his indebtedness to the bank was $3,542.08; that on the 21st day of September the plaintiff

overdrew and became indebted to the defendant in the sum of $425.24, and on that day his indebtedness to the bank was $3,867.32; that on the 22d day of September the plaintiff overdrew and became indebted to the defendant in the sum of $112.64, and on that day his indebtedness to the bank was $4,079.96; that on the 24th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $85.83, and on that day his indebtedness to the bank was $4,165.79; that on the 25th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $221.38, and on the same day deposited the sum of $218, and there remained due the defendant the sum of $4,169.17; that on the 26th day of September the plaintiff overdrew and became indebted to the defendant in the sum of $421.29, and on that day his indebtedness to the bank was $4,518.46; that on the 29th day of September the plain-
75 tiff overdrew and became indebted to the defendant in the sum of $70.30, and on that day his indebtedness to the bank was $4,588.76; that on the 1st day of October the plaintiff overdrew and became indebted to the defendant in the sum of $757.38, and on that day his indebtedness to the bank was $5,346.14; that on the 2d day of October the plaintiff overdrew and became indebted to the defendant in the sum of $30.66, and on the same day deposited the sum of $151, and there remained due the defendant the sum of $5,225.80; that on the 3d day of October the plaintiff overdrew and became indebted to the defendant in the sum of $530.28, and on that day his indebtedness to the bank was $5,756.08; that on the 4th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $95, and on that day his indebtedness to the bank was $5,851.08; that on the 5th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $129.19, and on that day his indebtedness to the bank was $5,980.27; that on the 6th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $82.91, and on that day his indebtedness to the bank was $6,063.18; that on the 8th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $393.00, and on that day his indebtedness to the bank was $6,456.18; that on the 10th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $15, and on that day his indebtedness to the bank was $6,471.18; that on the 11th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $10, and on that day his indebtedness to the bank was $6,481.18; that on the 12th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $2, and on that day his indebtedness to the bank was $6,483.18; that on the 13th
76 day of October the plaintiff overdrew and became indebted to the defendant in the sum of $7.00, and on that day his indebtedness to the bank was $6,490.08; that on the 15th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $11.58, and on the same day deposited the sum of $3,788.59, and there remained due the defendant the sum of $2,713.17; that on the 16th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $422.85, and on that day his indebted-

ness to the bank was $3,136.02; that on the 17th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $67.13, and on that day his indebtedness to the bank was $3,203.15; that on the 18th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $119.31, and on that day his indebtedness to the defendant was $3,322.46; that on the 19th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $238.79, and on the same day the defendant knowingly computed and charged as and for interest upon items of overdraft during the month of August the sum of $5.28, which said charge was at a greater rate of interest than that allowed by law and was 44.3 per cent. per annum; and on the same day defendant knowingly computed and charged as and for interest upon items of overdraft during the month of September in the sum of $29.11, which said charge was at a greater rate of interest than that allowed by law and was 10.3 per cent. per annum, and thereby became indebted to the defendant as per account in the sum of $3,595.64; that on the 20th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $74.55, and on that day his indebtedness to the bank was $3,670.19; that on the 22d day of October the plaintiff overdrew and became indebted to the defendant in the sum of $12.00, and on that day his indebtedness to the bank was $3,682.19; that on the 23d day of
77 October the plaintiff overdrew and became indebted to the defendant in the sum of $17.65, and on that day his indebtedness to the bank was $3,699.85; that on the 24th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $24.55, and on that day his indebtedness to the bank was $3,724.39; that on the 26th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $20.00, and on that day his indebtedness to the bank was $3,744.39; that on the 30th day of October the plaintiff overdrew and became indebted to the defendant in the sum of $15.00, and on that day the plaintiff was indebted to the bank in the sum of $3,759.39; that on the 31st day of October the plaintiff overdrew and became indebted to the defendant in the sum of $21.60, and on the same day he deposited the sum of $783.12, and there remained due the bank the sum of $2,997.87; that on the 2d day of November the plaintiff overdrew and became indebted to the defendant in the sum of $112.43, and on that day his indebtedness to the bank was $3,110.30; that on the 3d day of November the plaintiff overdrew and became indebted to the defendant in the sum of $60.82, and on the same day deposited the sum of $175.00, and there remained due the defendant the sum of $2,996.12; that on the 6th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $87.40, and on that day his indebtedness to the bank was $3,083.52; that on the 7th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $100.83, and on that day his indebtedness to the bank was $3,184.35; that on the 8th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $100.03, and on that day his indebtedness to the bank was $3,344.38;

that on the 9th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $37.08, and on that
78 day his indebtedness to the bank was $3,381.46; that on the 10th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $20.93, and on that day his indebtedness to the bank was $3,402.39; that on the 12th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $225.96, and on that day his indebtedness to the bank was $3,628.35; that on the 13th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $226.27, and on that day his indebtedness to the bank was $3,894.62; that on the 14th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $165.37, and on that day his indebtedness to the bank was $4,059.99; that on the 15th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $36.33, and on that day his indebtedness to the bank was $4,096.32; that on the 16th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $66.84, and on that day his indebtedness to the bank was $4,163.16; that on the 17th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $17.00, and on that day his indebtedness to the bank was $4,180.16; that on the 19th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $10.00, and on that day his indebtedness to the bank was $4,190.16; that on the 22d day of November the defendant knowingly computed and charged as and for interest upon items of overdraft during the month of October the sum of $38.33, which said charge was at a greater rate of interest than that allowed by law, and was 9.5 per cent. per annum, and plaintiff thereby became indebted to the defendant in the sum of $4,228.49; that on the 24th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $50.51, and on that day his indebtedness to the bank was $4,279.00; that on the 26th day of
79 November the plaintiff overdrew and became indebted to the defendant in the sum of $123.70, and on that day his indebtedness to the bank was $4,402,70; that on the 27th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $155.40. and on that day his indebtedness to the bank was $4,558.10; that on the 28th day of November the plaintiff overdrew and became indebted to the defendant in the sum of $81.20, and on that day his indebtedness to the bank was $4,639.30; that on the 1st day of December the plaintiff overdrew and became indebted to the defendant in the sum of $223.91, and on the same day deposited the sum of $263.00, and there remained due the bank the sum of $4.600.21; that on the 3d day of December the plaintiff overdrew and became indebted to the defendant in the sum of $299.44, and on the same day his indebtedness to the bank was $4,899.65; that on the 4th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $95.21, and on that day his indebtedness to the bank was $4,994.86; that on the 5th day of December the plaintiff overdrew and became indebted to

the defendant in the sum of $265.65, and on that day his indebtedness to the bank was $5,210.51; that on the 6th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $415.89, and on that day his indebtedness to the bank was $5,626.40; that on the 7th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $307.57, and on that day his indebtedness to the bank was $5,933.97; that on the 8th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $105, and on that day his indebtedness to the bank was $6,038.97; that on the 10th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $38.13, and on that day his indebtedness to the bank was
80 $6,077.10; that on the 11th day of December the plaintiff overdrew and became indebted to defendant in the sum of $154.34, and on that day his indebtedness to the bank was $6,228.44; that on the 12th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $16.00, and on that day his indebtedness to the defendant was $6,244.44; that on the 13th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $44.90, and on that day his indebtedness to the bank was $6,293.34; that on the 14th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $332.03, and on the same day the defendant knowingly computed and charged as and for interest upon items of overdraft during the month of November in the sum of $31.97, which said sum was at a greater rate of interest than that allowed by law and was 10.24 per cent. per annum, and the plaintiff thereby became indebted to the defendant in the sum of $6,657.34; that on the 17th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $594.92, and on the same day deposited the sum of $576.00, and there remained due the defendant the sum of $6,676.26; that on the 18th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $258.12 and on that day his indebtedness to the bank was $6,934.38; that on the 20th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $61.07, and on that day his indebtedness to the bank was $6,995.45; that on the 21st day of December the plaintiff overdrew and became indebted to the defendant in the sum of $71.38, and on that day his indebtedness to the bank was $7,066.83; that on the 22d day of December the plaintiff overdrew and became indebted to the defendant in the sum of $233.00, and on that day his indebtedness to the bank was $7,299.83; that on the 24th day of
81 December the plaintiff overdrew and became indebted to the defendant in the sum of $135.33, and on that day his indebtedness to the bank was $7,435.16; that on the 26th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $231.44, and on the same day deposited the sum of $192.00, and there remained due the bank the sum of $7,474.60; that on the 28th day of December the plaintiff overdrew and became indebted to the defendant in the sum of $20.97, and on that day his indebtedness to the bank was $7,495.57; that on the 29th day of

December the plaintiff overdrew and became indebted to the defendant in the sum of $240.50, and on that day his indebtedness to the bank was $7,736.07; that on the 31st day of December the plaintiff overdrew and became indebted to the defendant in the sum of $159.62, and on that day his indebtedness to the bank was $7,895.69; that on the 2d day of January, 1889, the plaintiff overdrew and became indebted to the defendant in the sum of $241.81, and on that day his indebtedness to the bank was $8,137.52; that on the 3d day of January the plaintiff overdrew and became indebted to the defendant in the sum of $418.17, and on that day his indebtedness to the bank was $8,555.69; that on the 4th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $352.17, and on that day his indebtedness to the bank was $8,907.86; that on the 5th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $179.49, and on that day his indebtedness to the bank was $9,087.35; that on the 7th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $13.51, and on the same day deposited the sum of $205.85, and there remained due the bank the sum of $8,895.01; that on the 8th day of January the plaintiff overdrew and became indebted to the bank in the sum of
82 $197.48, and on that day his indebtedness to the bank was $9,092.49; that on the 9th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $42.83, and on that day his indebtedness to the bank was $9,135.32; that on the 10th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $289.35, and on that day his indebtedness to the bank was $9,424.67; that on the 11th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $163.57, and on that day his indebtedness to the bank was $9,588.24; that on the 12th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $5.00, and on that day his indebtedness to the bank was $9,593.24; that on the 14th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $34.73, and on that day his indebtedness to the bank was $9,627.97; that on the 15th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $136.18, and on that day his indebtedness to the bank was $9,814.15; that on the 16th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $62.55, and on that day his indebtedness to the bank was $9,876.70; that on the 17th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $72.17, and on that day his indebtedness to the defendant was $9,948.87; that on the 18th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $66.00, and on that day his indebtedness to the bank was $10,014.87; that on the 19th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $259.60, and on that day his indebtedness to the bank was $10,274.56; that on the 21st day of January the plaintiff overdrew and became indebted to the defendant in the sum of $10.00, and on

that day his indebtedness to the bank was $10,248.56; that on
83 the 22d day of January the plaintiff overdrew and became indebted to the defendant in the sum of $71.12, and on that day his indebtedness to the bank was $10,355.68; that on the 23d day of January the plaintiff overdrew and became indebted to the defendant in the sum of $119.70, and on that day his indebtedness to the defendant was $10,475.38; that on the 24th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $219.08, and on that day his indebtedness to the bank was $10,694.46; that on the 25th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $179.20, and on the same day deposited the sum of $192.00, and there remained due the defendant the sum of $10,681.66; that on the 26th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $38.00, and on that day his indebtedness to the bank was $10,719.66; that on the 29th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $248.91, and on that day his indebtedness to the bank was $10,968.57; that on the 30th day of January the plaintiff overdrew and became indebted to the defendant in the sum of $8.00, and on that day his indebtedness to the bank was $10,976.57; that on the 31st day of January the plaintiff overdrew and became indebted to the defendant in the sum of $121.56, and on that day his indebtedness to the bank was $11,098.13; that on the 1st day of February, 1889, the plaintiff overdrew and became indebted to the defendant in the sum of $67.80, and on that day his indebtedness to the bank was $11,165.93; that on the 2d day of February the plaintiff overdrew and became indebted to the defendant in the sum of $489.11, and on the same day deposited the sum of $384.00, and there remained due the defendant on that day the sum of $11,271.04; that on the 4th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $179.75, and on that
84 day his indebtedness to the bank was $11,450.13; that on the 6th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $340.88, and on that day his indebtedness to the bank was $11,791.97; that on the 7th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $239.46, and on that day his indebtedness to the bank was $12,031.13; that on the 8th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $63.59, and on the same — he executed and delivered to the defendant his one promissory note for $9,875.00, payable thirty days from date and received therefor a credit for that amount as a deposit and there remained due the bank the sum of $2,219.72; that on the 9th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $167.31, and on that day his indebtedness to the bank was $2,337.03; that on the 11th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $171.36, and on that day his indebtedness to the bank was $2,558.39; that on the 12th day of February the plaintiff overdrew and became indebted to the defendant in the sum

of $78.33, and on that day his indebtedness to the bank was $2,636.72; that on the 13th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $28.25, and on that day his indebtedness to the bank was $2,664.97; that on the 14th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $94.01, and on that day his indebtedness to the bank was $2,758.98; that on the 15th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $4.00, and on that day his indebtedness to the bank was $2,762.98; that on the 16th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $29.20, and on that day his indebtedness to the bank was $2,792.88;
85 that on the 18th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $62.86, and on that day his indebtedness to the bank was $2,855.74; that on the 19th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $76.78, and on that day his indebtedness to the bank was $2,932.52; that on the 20th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $50.05, and on that day his indebtedness to the bank was $2,982.57; that on the 21st day of February the plaintiff overdrew and became indebted to the defendant in the sum of $132.72, and on that day his indebtedness to the bank was $115.29; that on the 22d day of February the plaintiff overdrew and became indebted to the defendant in the sum of $11.00, and on that day his indebtedness to the bank was $3,126.29; that on the 23d day of February the plaintiff overdrew and became indebted to the defendant in the sum of $4.06, and on that day his indebtedness to the bank was $3,130.35; that on the 25th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $67.02, and on that day his indebtedness to the bank was $3,197.37; that on the 26th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $3.33, and on that day his indebtedness to the bank was $3,200.70; that on the 27th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $14.57, and on that day his indebtedness to the bank was $3,215.27; that on the 28th day of February the plaintiff overdrew and became indebted to the defendant in the sum of $24.44, and on that day his indebtedness to the bank was $3,289.71; that on the 1st day of March the plaintiff overdrew and became indebted to the defendant in the sum of $12.09, and on that day his indebtedness to the bank was $3,251.80; that on the 2d day of March the plaintiff over-
86 drew and became indebted to the defendant in the sum of $135.30, and on that day his indebtedness to the bank was $3,387.10; that on the 5th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $54.63, and on that day his indebtedness to the bank was $3,441.73; that on the 6th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $98.45, and on that day his indebtedness to the bank was $3,540.18; that on the 9th day of March the plaintiff overdrew and became indebted to the defendant in the sum of

$479.70, and on that day his indebtedness to the bank was $4,019.88; that on the 11th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $34.22, and on that day his indebtedness to the bank was $4,054.10; that on the 12th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $50.00, and on that day his indebtedness to the bank was $4,104.10; that on the 13th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $45.42, and on that day his indebtedness to the defendant was $4,149.52; that on the 14th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $26.71, and on that day his indebtedness to the bank was $4,176.23; that on the 15th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $50.90 and on that day his indebtedness to the defendant was $4,227.13; that on the 16th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $18.80, and on that day his indebtedness to the bank was $4,245.93; that on the 18th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $3.00, and on that day his indebtedness to the bank was $4,248.93; that on the 22d day of March the plaintiff overdrew and became indebted to the defendant in the sum of $3.35, and on that day his in-
87 debtedness to the bank was $4,252.28; that on the 23d day of March the plaintiff overdrew and became indebted to the defendant in the sum of $11.20, and on that day his indebtedness to the bank was $4,263.68; that on the 25th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $140.00, and on the same day the defendant knowingly computed and charged as and for interest upon items of overdraft during the month of December the sum of $56.17, at a greater rate of interest than that allowed by law and was a rate of 10.27 per annum, and during the month of January the sum of $84.58, which said sum was at a greater rate of interest than that allowed by law, and was 10.2 per cent. per annum, and upon overdrafts during the month of February the sum of $39.10, which said sum was at a greater rate of interest than that allowed by law and was 10.39 per cent. per annum, and the plaintiff thereby became indebted to the defendant in the sum of $4,583.33; that on the 26th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $13.85, and on that day his indebtedness to the bank was $4,597.18; that on the 28th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $90.54, and on that day his indebtedness to the bank was $4,687.72; that on the 28th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $26.00, and on that day his indebtedness to the bank was $4,713.72; that on the 30th day of March the plaintiff overdrew and became indebted to the defendant in the sum of $50.55, and on that day his indebtedness to the bank was $4,764.27; that on the 1st day of April, 1889, the plaintiff overdrew and became indebted to the defendant in the sum of $937.00, and on the same day deposited and thereby paid said bank the sum of $2,389.69, and on that day

his indebtedness to said bank was $3,274.95; that on the 2d
88 day of April the plaintiff overdrew and became indebted to the defendant in the sum of $22.50, and on that day his indebtedness to the bank was $3,297.45; and on the 3d day of April the plaintiff overdrew and became indebted to the defendant in the sum of $5.00, and on that day his indebtedness to the bank was $3,302.45; that on the 4th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $305.27, and on that day his indebtedness to the bank was $3,607.72; that on the 5th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $125.60, and on that day his indebtedness to the bank was $3,733.32; that on the 6th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $285.76, and on that day his indebtedness to the bank was $4,019.08; that on the 8th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $334.25, and on that day his indebtedness to the bank was $4,353.33; that on the 9th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $30.35, and on that day his indebtedness to the bank was $4,383.68; that on the 11th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $176.77 and on that day he deposited and thereby paid said bank the sum of $740, and on that day his indebtedness to the bank was $3,900.13; that on the 12th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $50.90, and on that day his indebtedness to the bank was $3,951.03; that on the 15th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $149.25, and on that day his indebtedness to the bank was $4,100.28; that on the 16th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $52.85, and on that day his indebtedness to the bank was $4,153.13; that on the
18th day of April the plaintiff overdrew and became indebted to
89 the defendant in the sum of $65.09, and on that day his indebtedness to the bank was $4,218.22; that on the 19th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $17.85, and on that day his indebtedness to the bank was $4,236.07; that on the 20th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $13, and on that day his indebtedness to the bank was $4,249.07; that on the 22d day of April the plaintiff overdrew and became indebted to the defendant in the sum of $164.64, and on that day his indebtedness to the bank was $4,413.71; that on the 23d day of April the plaintiff overdrew and became indebted to the defendant in the sum of $28.82, and on that day his indebtedness to the bank was $4,434.53; that on the 25th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $180, and on that day his indebtedness to the bank was $4,614.53; that on the 27th day of April the plaintiff overdrew and became indebted to the defendant in the sum of $211.78, and on that day his indebtedness to the bank was $4,901.31; that on the 29th day of April the plaintiff overdrew and became indebted to the defendant in the

sum of $20, and on that day his indebtedness to the bank was $4,921.31; that on the 1st day of May the plaintiff overdrew and became indebted to the defendant in the sum of $46.84, and on that day his indebtedness to the bank was $4,968.15; that on the 2d day of May the plaintiff overdrew and became indebted to the defendant in the sum of $95.83, and on that day his indebtedness to the bank was $5,063.98; that on the 3d day of May the plaintiff overdrew and became indebted to the defendant in the sum of $31.34, and on the same day deposited and thereby paid to said bank the sum of $84.70, and on that day his indebtedness to the bank was $5,010.62; that on the 4th day of May the plaintiff overdrew and became indebted to the defendant in the sum of
90 $120.06, and on that day his indebtedness to the bank was $5,130.68; that on the 6th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $8.34, and on that day his indebtedness to the bank was $5,139.02; that on the 7th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $127.90, and on that day his indebtedness to the bank was $5,266.92; that on the 8th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $159.36, and on that day his indebtedness to the bank was $5,426.28; that on the 9th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $119.83, and on that day his indebtedness to the bank was $5,546.11; that on the 10th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $76, and on that day his indebtedness to the bank was $5,622.11; that on the 11th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $30.41, and on that day his indebtedness to the bank was $5,652.52; that on the 12th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $12.17, and on that day his indebtedness to the bank was $5,664.69; that on the 13th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $225.98, and on that day his indebtedness to the bank was $5,890.67; that on the 14th day of May the plaintiff overdrew and became indebted to defendant in the sum of $10.00, and on that day his indebtedness to the bank was $5,900.67; that on the 15th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $16.80, and on that day his indebtedness to the bank was $5,917.47; that on the 16th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $31.48, and on that day his indebtedness to the bank was $5,948.95; that on the
17th day of May the plaintiff overdrew and became in-
91 debted to the defendant in the sum of $35, and on the same — deposited the sum and thereby paid said bank the sum of $245.30, and on that day his indebtedness to the bank was $5,778.65; that on the 18th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $298.79, and on that day his indebtedness to the bank was $6,077.44; that on the 19th day of May the plaintiff overdrew and became indebted to the defendant in the sum of 50 cents, and on that day his indebtedness

to the bank was $6,077.94; that on the 20th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $27.25, and on that day his indebtedness to the bank was $6,105.19; that on the 21st day of May the plaintiff overdrew and became indebted to the defendant in the sum of $24.89, and on that day his indebtedness to the bank was $6,130.08; that on the 23d day of May the plaintiff overdrew and became indebted to the defendant in the sum of $46.00, and on that day deposited and thereby paid said bank the sum of $727.41, and on that day his indebtedness to said bank was $5,448.67; that on the 24th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $277.89, and on that day his indebtedness to the bank was $5,726.56; that on the 25th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $20.67, and on that day his indebtedness to the bank was $5,747.23; that on the 28th day of May the plaintiff overdrew and became indebted to the defendant in the sum of $287.64, and on the same day the plaintiff made, executed and delivered to the defendant his one promissory note for $5,865.88, payable thirty days after date, and his deposit at the bank was credited with that amount, and on that day his indebtedness to the bank was $168.99; that on the 29th day of May the plaintiff overdrew and became indebted to the defendant
92 in the sum of $7.50, and on that day his indebtedness to the bank was $176.49; that on the 31st day of May the plaintiff overdrew and became indebted to the defendant in the sum of $128.75, and on that day his indebtedness to the bank was $305.24; that on the 3d day of June, 1889, the plaintiff overdrew and became indebted to the defendant in the sum of $232.82, and on that day his indebtedness to the bank was $438.06; that on the 4th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $10.33, and on that day his indebtedness to the bank was $448.39; that on the 5th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $70.81, and on that day his indebtedness to the bank was $519.20; that on the 11th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $2.00, and on that day his indebtedness to the bank was $521.20; that on the 19th day of June the plaintiff overdrew and became indebted to the defendant in the sum of 25 cents, and on the same day the defendant knowingly computed and charged as and for interest upon overdrafts during the month of May the sum of $42.27, which said sum was at a greater rate of interest than that allowed by law and was 9.8 per cent. per annum, and the plaintiff thereby became indebted to the defendant in the sum of $563.72; that on the 27th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $775, and on that day his indebtedness to the bank was $564.47; that on the 30th day of June the plaintiff overdrew and became indebted to the defendant in the sum of $53.76, and on the same day the defendant knowingly computed and charged as and for interest upon items of overdraft during the month of March the sum of $35.25, which said charge was at a greater rate of interest than that allowed by law, and was

10.2 per cent. per annum, and upon items of overdraft during the month of April the sum of $35.00, which said charge was
93 at a greater rate of interest than that allowed by law, and was 10.1 per cent. per annum, and the plaintiff thereby became indebted to the defendant in the sum of $688.48; that on the 17th day of July the defendant knowingly charged and computed as and for interest upon items of overdraft during the month of June the sum of $5.11, which said sum was at a greater rate of interest than that allowed by law, and was at the rate of 12.04 per cent. per annum and the plaintiff thereby became indebted to the defendant in the sum of $693.59; that on the 9th day of September the defendant knowingly computed and charged as and for interest upon items of overdraft during the month of July the sum of $6.00, which said sum was at a greater rate of interest than that allowed by law, and was at the rate of 10.18 per cent.; that on the same day defendant knowingly computed and charged as and for interest upon items of overdraft during the month of August the sum of $6.03, which said sum was at a greater rate of interest than that allowed by law and was at the rate of 10.23 per cent., and the plaintiff thereby became indebted to the defendant in the sum of $705.62; that on the 18th day of September the plaintiff overdrew and became indebted to the defendant in the sum of 51 cents, and his indebtedness to the bank on that day was $706.13; that on the 25th day of September the plaintiff overdrew and became indebted to the defendant in the sum of 40 cents, and on that day his indebtedness to the bank was $706.53; that on the 9th day of October the plaintiff deposited the sum of 91 cents, and there remained due the bank the sum of $705.62. That on the 15th day of October the defendant having in its possession the sum of $47.45, money belonging to the plaintiff, retained the same and it thereby became a credit due the plaintiff upon his indebtedness for the illegal claims of the defendant against the plaintiff, and on the same day the defendant, without any authority
94 or consent of the plaintiff, paid the sum of $547.45 to the Merchants' National Bank of Sioux City, and erroneously entered the two last items upon the account between the plaintiff and the defendant, and by said erroneous entries the account was made to appear to be $730.81 against the plaintiff. That on the 22d day of October the defendant knowingly computed and charged upon items of overdraft during the month of October the sum of $6.66, which said sum was at a greater rate of interest than that allowed by law, and was for 11.5 per cent. per annum, and on the same day the defendant knowingly computed and charged as and for interest upon items of overdraft during the month of October the sum of $5.03, which said sum was at a greater rate of interest than that allowed by law and was for 11.5 per cent. per annum, and the plaintiff thereby became indebted to the defendant in the sum of $742.50. That on the 23d day of October the defendant having in its possession the sum of $400, money belonging to the plaintiff, retained the same and it thereby became a credit due the plaintiff upon his indebtedness for the illegal claims of the defendant against the plaintiff, and there remained due the defendant the sum of

$342.50. That on the 11th day of December the defendant knowingly computed and charged as and for interest upon items of overdraft during the month of November the sum of $2.60, which said sum was at a greater rate of interest than that allowed by law, and was at the rate of 9.5 per cent. per annum, and plaintiff thereby became indebted to the defendant in the sum of $345.19. That on the 2d day of January, 1890, the defendant knowingly computed and charged as and for interest upon items of overdraft during the month of December the sum of $2.80, which said sum was at a greater rate of interest than that allowed by law, and was at the rate of 9.5 per cent. per annum, and the plaintiff thereby became indebted to the defendant in the sum of $347.99. That on the 22d day of February the de-
95 fendant knowingly computed and charged as and for interest upon items of overdraft during the month of January the sum of $3, which said sum was at a greater rate of interest than that allowed by law, and was for 10.27 per cent. per annum, and the plaintiff thereby became indebted to the defendant in the sum of $350.99. That on the 20th day of March the defendant knowingly computed and charged as and for interest upon items of overdraft during the month of February the sum of $2.72, which said sum was at a greater rate of interest than that allowed by law, and was for 10.52 per cent. per annum, and the plaintiff thereby became indebted to the defendant in the sum of $353.71; that on the 25th day of April the defendant knowingly computed and charged as and for interest upon items of overdraft during the month of March the sum of $3.00, which said sum was at a greater rate of interest than that allowed by law, and was at the rate of 10.06 per cent. per annum, and the plaintiff thereby became indebted to the defendant in the sum of $356.71; that on the 12th day of June the defendant had in its possession the sum of $356.71, money belonging to the plaintiff, retained the same, and it thereby became a credit due the plaintiff upon his indebtedness for the illegal claims of the defendant against the plaintiff.

That the said note for $10,206.66, made and executed by the plaintiff on the 10th day of June, 1886, included illegal interest before that time charged upon overdrafts and mentioned in the accounts prior to said June 10th, and included $206.66 interest in advance, for the term of ninety days; and at the time of which execution plaintiff was credited in his account with defendant bank the sum of $10,000; and on the 11th day of September, 1886, said note was renewed and the new note was for the sum of $10,000, and the sum of $413.33 interest thereon, being the sum of $206.66 past due and the balance $206.67 interest in advance for the term
96 of ninety days. And on the 13th day of December, 1886, said note was renewed in the sum of $10,000 for ninety days and the interest in advance in the sum of $206.66 was charged to plaintiff's account in the said bank. And on the 16th day of March, 1887, said note was renewed in the sum of $10,000 for ninety days and the interest thereon in advance in the sum of $206.66 was charged to plaintiff's account with the said bank. And on the 6th day of July, 1887, the said note was renewed in the sum of $10,000

for four months and interest thereon past due and in advance in the sum of $315.55 was charged to plaintiff's account in said bank. And on the 14th day of November, 1887, the principal sum of said note was charged in account against the plaintiff upon the books of said bank. The said note for $4,109.33, made, executed and delivered by plaintiff to defendant on the 10th day of June, 1886, was renewed on the 16th day of October, 1886, in the sum of $4,218.66, including the interest upon said note from the said 10th day of June, 1886, until the maturity of said last-mentioned note. And said note for $4,000, executed by plaintiff to defendant on the 10th day of June, 1886, was renewed on the 16th day of October, 1886, and the interest thereon from the 10th day of June, 1886, was included in the sum of $109.33, in all in the sum of $4,109.33. And on the 22d day of April, 1887, the last-described note and one for $4,218.66 made, executed and delivered on October 16th, 1886, were both renewed and included in one note of date the 22d day of April, 1887, for the sum and amount of $8,529.47, $529.47 being for interest. And on the 9th day of November, 1887, said note was renewed in the sum of $9,340.60, due and payable ninety days after date; $811.13 of said note was for interest, and was renewed on the 23d day of March, 1888, in the sum of $9,340.60 and the interest thereon in the sum of $276.06 charged to his account and included in the note hereinafter mentioned and described; and said note was in-
97 cluded in the account and notes of the 23d day of March, 1888, hereinafter more specifically stated, and the sum of $276.06 interest on the said note for $9,340.60, for the term of ninety days was, on the 23d day of March, 1888, included in a transaction hereinafter described, which occurred on the 23d day of March, 1888. The said note for $10,000 was made, executed and delivered by plaintiff to defendant on the 22d day of April, 1887, and was renewed on the 9th day of November in the sum of $10,000 and made due and payable 90 days from date thereof. And the interest past due on said indebtedness in the sum of $437.77 was included in and made a part of said note for $9,340.60. And said note for $10,000 of date November 9th, 1887, was renewed on the 23d day of March, 1888, by a new note for the sum of $10,000 due 90 days after date, and the past-due interest thereon in the sum of $295.56 was included in a note hereinafter described. And said note of $10,000 of date March 23 was renewed on the 18th day of July, 1888, by a note made, executed and delivered by the plaintiff to defendant for the sum of $10,000, due 90 days after date, and the past-due interest on said note was included in another note hereinafter described. And said $10,000 note was renewed on the 9th day of November, 1888, by a new note of $10,000, due ninety days after date, and the interest in the sum of $253.33 was included in a new note hereinafter described. And said note for $10,000 was again renewed on the 27th day of April, 1889, by a new note made, executed and delivered by plaintiff to defendant for the sum of $10,000, due ninety days after date, and the past-due interest on said note in the sum of $373.33 was included in another note hereinafter described. And said note for $10,000 was renewed on the 20th day of January, 1890,

and the past-due interest thereon in the sum of $586.66 was finally included in the bonds secured by mortgage hereinafter de-
98 scribed and dated the 15th day of March, 1890. And said note for $10,000 was also included in said bonds of date March 15, 1890, and the interest thereon from the 27th day of January to the 17th day of May in the sum of $17.77 was also included in bonds. A note for $10,000 hereinbefore described, executed on the 28th day of September instead of the 30th day of September, 1887, was renewed on the 23d day of March, 1888, and the interest thereon past due in the sum of $384.44, was, together with the sum of $295.56 interest due on $10,000 note, due March 23, 1888, and $276.06 due on the $9,340.60 note, due on March 23, 1888. And said $10,000 note of date March 23, 1888, was renewed on the 18th day of July, 1888, in the sum of $10,000, due ninety days from date thereof, and the past-due interest thereon in the sum of $255.55 was included in another note hereinafter described. And said $10,000 note executed on the 18th day of July, 1888, and the interest thereon past due in the sum of $253.33 was included in another note hereinafter described. And said note for $10,000 executed on the 9th day of November was again renewed on the 27th day of April, 1889, by a note made, executed and delivered by plaintiff to defendant in the sum of $10,000, and the past-due interest thereon in the sum of $3,731.33 was included in a note hereinafter described. And said note for $10,000 dated April 27, 1889, was again renewed on the 20th day of January, 1890, by a note made, executed and delivered by plaintiff to defendant for $10,000, due thirty days after date, and past-due interest thereon in the sum of $586.66 was carried forward and included in the bonds and mortgage hereinafter described, executed on the 15th day of March, 1890. Said note for $10,000 made, executed and delivered by plaintiff to defendant on the 20th day of January, 1890, together with $117.77 interest thereon, was included in and formed a part of the debt, evidence in the bonds and mortgage hereinafter described, executed and dated March 15, 1890. That on
99 the 23d day of March, 1888, the plaintiff made, executed and delivered to defendant his promissory note for the sum of $2,500, due in sixty days after date, and was renewed on the 9th day of November, 1888, in the sum of $2,625, and due sixty days after date, $125, which last-mentioned note was for interest past due on the date the same was given, and said note for $2,625 and interest to the amount of $283.50 was included in the bonds and mortgage hereinafter described which were executed and dated March 15, 1890. On the said 23d day of March, 1888, one E. E. Lewis, for the accommodation of plaintiff, as hereinbefore stated, made, executed and delivered his promissory note, due ninety days after date, for the sum of $10,000, and said note was renewed on the 18th day of July, 1888, by said E. E. Lewis, as an accommodation to plaintiff, by a renewal note for $10,000, and the interest thereon past due in the sum of $225.55 was included in the note hereinafter mentioned and described. And said note for $10,000 was again renewed by the same accommodation maker on the 9th day of November, 1888, and the past-due interest thereon in the sum of $253.33 was in-

cluded in a note hereinafter described. And said promissory note for $10,000 was again renewed by said accommodation maker on the 27th day of April, 1889, and the interest thereon past due in the sum of $373.33 was included in a note hereinafter described. And said note for $10,000 was included in said bonds and mortgage and made, executed and delivered on the 15th day of March, 1890, and the interest thereon in the sum of $773.33 was included in the said bonds and mortgage executed and delivered on the 15th day of March, 1890. The accommodation note made by Geo. P. Day for the accommodation of the plaintiff executed and delivered to the defendant on the 23d day of March, 1888, in the sum of $10,000,
100 was carried into the overdraft account against the plaintiff on the 18th day of July, 1888, and the interest thereon past due *was* included in the same, $255.55, was also charged against plaintiff in his overdraft account of the same date; that the accommodation note of A. L. Hudson, made, executed and delivered for the accommodation of the plaintiff, due ninety days after date, and the past-due interest on said $8,000 note *was* in the sum of $206.22 was included in a note hereinafter described; and said note for $8,000 was again renewed by said Hudson accommodation of date November 9, 1888, in the sum of $8,000, due ninety days after date, and the past-due interest thereon in the sum of $202.66 was included in a note hereinafter described; and said $8,000 note was again renewed by accommodation note made, executed and delivered by said Hudson on the 27th day of April, 1889, in the sum of $8,000, due ninety days after date, and the past-due interest in the sum of $298.66 was included in a note hereinafter described; and said $8,000 was included in said bonds and mortgage of date March 15, 1890, together with the past-due interest thereon in the sum of $565.33. That the contract note heretofore mentioned, executed by plaintiff to defendant on the 23d day of March, 1888, was kept and retained by defendant and interest charged thereon to June 12, 1890, in the sum and amount of $1,031.86, entered into and formed a part of the debt represented in said bonds and mortgage of date the 15th day of March, 1890; that the promissory note for $9,875, heretofore described executed by the plaintiff to the defendant on the 8th day of February, 1888, due and payable thirty days after date, was retained by the defendant and interest on the principal sum thereof in the sum of $547.45 was charged into the overdraft accounts as hereinbefore stated, and the further sum of $331.34, together with the principal sum, entered into and became a part of said bonds and mortgage dated March 15, 1890; said note for the sum of $5,865.88, made,
101 executed and delivered by plaintiff to defendant on the 28th day of May, 1889, due thirty days after date, was retained by defendant and interest thereon in the sum of $371.43, together with the principal sum, entered into and became a part of the indebtedness by said bonds and mortgage of date March 15, 1890; on the 18th day of July, 1888, the plaintiff made, executed and delivered his note on that day, due and payable ninety days after date, to the defendant in the sum of $972.87, given for

past-due interest on said accommodation note made, executed and delivered by A. L. Hudson for $8,000, of date March 23, 1888, in the sum of $206.22, and the interest on the said accommodation note of E. E. Lewis, of date March 23, 1888, in the sum of $255.55, and interest on the said accommodation note of M. P. Scott, of date March 23, 1888, in the sum of $255.55, and interest on said note of the plaintiff of date March 23, 1888, in the sum of $255.55, which said note was retained by the defendant and the interest thereon in the sum of $128.96, together with the principal sum of said note, entered into and became a part of the said bonds and mortgage of date the 15th of March, 1890. That on the 9th day of November, 1888, the plaintiff made, executed and delivered his note to the defendant on that date for the sum of $962.65, due ninety days after days, which said note was given for interest charged by defendant against the plaintiff upon the accommodation note of A. L. Hudson for $8,000, of date July 18, 1888, in the sum of $202.66, and interest upon the accommodation note of M. P. Scott for $10,000, of date July 18, 1888, in the sum of $253.33, and interest upon the accommodation note of E. E. Lewis for $10,000, of date July 18, 1888, in the sum of $253.33, and interest upon the plaintiff's note for $10,000, of date July 18, 1888, in the sum of $253.33, and this note was retained by the defendant and interest thereon charged by defendant to plaintiff in the sum of $103.93, together with the principal
102 sum, entered into and became a portion of the indebtedness included in said bonds and mortgage executed and delivered upon the 15th day of March, 1890. On the 27th day of April, 1889, the plaintiff made, executed and delivered to the defendant his promissory note of that date for the sum of $1,418.65, due on demand, which said note was given for the past-due interest upon the plaintiff's note for $10,000 of date November 9, 1888, in the sum of $373.33, and interest on the accommodation note of M. P. Scott for $10,000, of date November 9, 1888, in the sum of $373.33, and interest on the accommodation note of A. L. Hudson for $8,000, of date November 9, 1888, in the sum of $298.66, and interest upon the accommodation note of E. E. Lewis for $10,000, of date November 9, 1888, in the sum of $373.33, which said note was retained by the defendant and the interest thereon charged in the sum of $100.21, together with the principal sum entered into and became a part of the said bonds and mortgage executed and delivered by plaintiff to defendant on the 15th day of March, 1890. There remained on the 17th day of June, 1890, upon the bank account between the plaintiff and defendant, including the items hereinbefore set out of $3,040.38, and on that day the plaintiff made, executed and delivered his note for that amount, due and payable six months after date, which said note, together with interest thereon in the sum of $860.42, entered into and formed a part of the judgment and decree hereinafter mentioned and described.

That on or about the 15th day of March, 1890, all of the indebtedness evidenced by said charges, account and notes then claimed by defendant against plaintiff was incorporated into certain bonds of that date made and executed and delivered by plaintiff to the Union

Loan and Trust Company of Sioux City, Iowa, as trustee for defendant, which said bonds were in the sum of $1,000 each, in all one hundred bonds, into which at that time and subsequently all of
103 said indebtedness, except that represented by said note for $3,040.38 executed and delivered to the defendant on the 17th day of June, 1890, was merged. That said bonds were secured by mortgage on certain lands situated in the counties of Woodbury and Plymouth, in the State of Iowa. On or about the 3d day of March, 1892, a suit in equity was commenced in the district court of Woodbury county, Iowa, and a judgment and decree was entered against plaintiff on or about the 23d day of December, 1893, for the sum of $94,578.90, being the entire indebtedness due from plaintiff to defendant as entered by said court upon the said bonds and said note for $3,040.38. And on the 19th day of March, 1894, upon the execution sale of the premises mortgaged to secure said indebtedness, the defendant knowingly took and received the entire sum of said judgment, including all the usurious interest before that time, knowingly charged in the said account for overdrafts upon all of the said notes and bonds, in all the sum of $47,020.37. That the items of interest upon the overdrafts aforesaid, charged upon account against plaintiff, were so charged without any contract therefor, at the time of such charging were each and all at a higher rate of interest than that allowed by law of Iowa, corrupt and usurious, and in violation of sections 5197 and 5198 of the Revised Statutes of the United States. The items of interest upon overdrafts aforesaid, charged by defendant and carried into the notes aforesaid, were knowingly charged, contracted for by their incorporation in said notes, reserved, taken and received by the defendant as part of the entire amount of interest paid by the plaintiff and knowingly received by defendant, in the total amount of money collected upon said judgment and decree, and knowingly charging, contracting, reserving, taking and receiving of which was a corrupt and usurious transaction, in violation of sections 5197 and 5198 of the Revised Statutes of the United
104 States, and occurred within two years prior to the commencement of this action. That the entire amount of interest as aforesaid, knowingly charged, contracted for, taken and received was in amount the sum of $47,020.37, whereby defendant became indebted to plaintiff in the sum of $94,040.74, no part of which has been paid.

Wherefore plaintiff demands judgment against defendant in the sum of $94,040.74.

To which the defendant, on the 9th day of November, 1895, filed the following answer:

Answer to Amended and Substituted Petition.

For answer to the amended and substituted petition of the plaintiff filed herein on the 18th day of September, 1895, the defendant states:

That, except as hereinafter admitted, it denies each and every allegation therein contained.

It admits that the defendant is a corporation organized and doing business under and by virtue of the national banking laws of the United States.

It admits that the plaintiff, during the periods mentioned in his petition, was transacting business with the defendant as a customer and depositor.

It admits that the plaintiff made, at the various times mentioned and set forth, a deposit or deposits of the various sums as alleged.

It admits that the plaintiff drew checks upon the said defendant bank at the various dates and in the various amounts as alleged in his said petition, and that overdrafts were thereby created in the various amounts and at the various times which the plaintiff has alleged.

It admits that the defendant charged interest upon the said
105 overdrafts in the amounts and at the times which the plaintiff has alleged, but not at the rate which the plaintiff has set forth.

It admits that the plaintiff made and executed his promissory notes, both by himself and through his accommodation makers for the amounts and at the various dates alleged, and admits that all of said indebtedness remaining unpaid was included in the bonds of the plaintiff secured by a mortgage upon his real estate as set forth, but especially denies that the defendant has at any time charged or received any greater sum for interest than is permitted by the laws of the State of Iowa, and denies that the plaintiff has ever paid any interest upon overdrafts to the defendant at any time or in any manner except as shown by the deposits which he has set forth in his petition.

It denies that any interest on overdrafts was included in the judgment or decree obtained against the plaintiff on foreclosure of the bonds and mortgage recited, and denies that any such interest was paid by the sale of the property included in the said mortgage; and especially denies that under a proper and just construction of sections 5197 and 5198 of the Revised Statutes of the United States, any greater amount can ever be recovered in such cases than double the amount of the unlawful interest charged, and denies that under the said statutes the plaintiff is entitled to recover in any event more than double the amount of the unlawful interest charged and paid, and denies that in any event the plaintiff is entitled to recover back any lawful interest paid.

And further answering, the defendant states that in accordance with the universal custom of banks, it charged against the account of the plaintiff at the end of each month interest on his average overdraft during the month at the rate of interest permitted by the laws of Iowa, and that if at times, through the inadvertence
106 or mistake of the clerks and accountants of the bank, the bank charged more than such proper rate, at other times, through similar inadvertence and mistake, a less amount was charged, so that during the course of its business with the plaintiff, the total amount charged to him as interest upon overdrafts was two thousand seventy-eight dollars and eighty cents ($2,087.80), while at

the legal rate under the laws of Iowa, and according to the custom of bankers, there was due from the plaintiff to the defendant the sum of two thousand ninety-six dollars and sixty cents ($2,096.60), and there was no intention to charge usurious interest at any time. The defendant denies that the said sum or in fact any interest was paid upon the said overdrafts by the sale of the property of the plaintiff as alleged in his petition, but on the contrary avers that before the rendition of the judgment and decree in the said foreclosure proceedings, the court ordered deducted from the amount found due all sums charged as interest upon overdrafts, which was in fact deducted, and such sums were not included in the judgment and decree, and the defendant denies that on the sale of the property of the plaintiff on the said judgment foreclosure, any of the sums of interest upon overdrafts were thereby paid, but on the contrary alleges that there is still a large deficit on the said judgment amounting to about the sum of ten thousand dollars ($10,000), which was not paid by the sale of the said property, and has not since been paid.

Division II.

And further answering, this defendant alleges that under the said section 5198 of the Revised Statutes of the United States, it is provided, that such action must be commenced within two years from the time the usurious transaction occurred, and further alleges that if any such usurious interest was in fact paid by the plaintiff, it was so paid more than two years prior to the time of the com-
107 mencement of this suit, and therefore said suit is barred by lapse of time.

The defendant further alleges that all matters, accounts and transactions between the plaintiff and the defendant were merged in a written settlement on the 17th day of June, 1890, a copy of which is hereto attached, marked Exhibit "1" and made a part of this answer, and under the said written settlement the plaintiff delivered to the defendant the sum of sixty-one thousand dollars ($61,000) in bonds and his promissory note for the sum of three thousand, forty dollars and thirty-eight cents ($3,048.38), and that the said bonds and note were received by the defendant in full payment and settlement of all existing liability and indebtedness on the part of the plaintiff to the defendant, and thereby the plaintiff paid to this defendant all sums charged for interest or otherwise, and that the said settlement took place more than two years prior to the bringing of this suit, and this suit is therefore barred by limitation.

Division III.

And further answering, the defendant alleges that the facts and allegations set forth in the plaintiff's petition constitute his cause of action, and the cause of action therein set forth has been fully determined and adjudicated in a case in which The Union Loan and Trust Company, trustee for T. J. Stone and the First National Bank of Sioux City, Iowa, was plaintiff, and D. H. Talbot, the present plaintiff, was defendant, in which said suit the said

Union Loan and Trust Company, trustee for the said T. J. Stone and the said First National Bank of Sioux City, Iowa, did, on or about the 3d day of March, 1892, bring an action of foreclosure upon the bonds and trust deed securing the same, which are set forth in the plaintiff's petition, and against the said D. H. Talbot *et al.*, to which said petition the said D. H. Talbot made his answer in defense, claiming substantially the same state of facts as he
108 now sets forth in this independent action; that in the said foreclosure proceeding a full accounting was had between the parties upon the matters growing out of the issue and negotiation of the said bonds and trust deed and a full accounting as to all interest included in the said bonds, charged by the defendant upon the overdraft of the plaintiff at the said bank at various times throughout their business career, and after a full hearing and trial of the said cause, a final decree was entered by the said district court of Woodbury county, State of Iowa, which said decree was entered on the 18th day of January, 1894, fully adjudicating and determining all controversies between the parties growing out of the said transactions, and deducting from the claim of the said plaintiff, all interest charged by this defendant upon the overdrafts of the plaintiff at the said bank; and by reason of the fact that the said D. H. Talbot did allege as a defense in the said foreclosure suit all the facts and matters which he now relies upon for recovery, and because of the fact that he did obtain and recover a reduction of the amount of the said judgment and decree in the amount of all the interest charged on the overdrafts of the plaintiff, and for the further reason that in the said foreclosure suit, he as a defendant had the right to allege and claim all the defenses of overcharge of interest, either upon notes or overdrafts or the payment of a greater amount of interest than the laws of Iowa permit, and because in the said cause he had the right to have the said matters fully adjudicated, he should be and is now estopped from maintaining this present action.

Wherefore the defendant asks that it may be discharged, and for judgment for costs.

EXHIBIT "1."

This agreement, made and entered into on this 17th day of June, 1890, by and between D. H. Talbot, of Sioux City, Iowa, and the First National Bank of Sioux City, Iowa, witnesseth:

109 That whereas the First National Bank of Sioux City has received from the said D. H. Talbot, one hundred bonds or notes of $1,000.00 each, executed to the Union Loan and Trust Company of Sioux City, and secured by his certain trust deed or mortgage also executed to the said Union Loan and Trust Company, all dated March 15, 1890, and whereas the said First national bank this day surrendered to said Talbot and cancelled the following notes:

D. H. Talbot, note dated May 17, 1890		$10,000.00
M. P. Scott, note dated May 17, 1890		10,000.00
A. L. Hudson, note dated April 27, 1889		8,000.00
D. H. Talbot, note dated April 27, 1889		1,418.65
D. H. Talbot, note dated July 18, 1888		927.87
D. H. Talbot, note dated November 9, 1888		962.65
D. H. Talbot, note dated March 23, 1888	$956.06	
Upon which is indorsed	679.61	
		276.45
D. H. Talbot, note dated February 8, 1889		9,875.00
D. H. Talbot, note dated November 9, 1888		2,625.00
D. H. Tabot, note dated May 28, 1889		5,865.30
D. H. Talbot, note dated April 27, 1889		10,000.00
$10,000 indorsed January 20th, 1890.		
M. P. Scott, note dated April 27, 1890		10,000.00
$10,000 indorsed January 20, 1890.		
E. E. Lewis, note dated April 27, 1889		10,000.00
Adding interest to March 15, 1890, on above at 10 per cent		4,043.88
Total notes and interest amounting to		$64,040.38

And whereas there are certain liens and incumbrances on said mortgaged premises, prior to said deed of trust, amounting to not to exceed $39,000.00.

Now, therefore, it is agreed that the First national bank and T. J. Stone shall have and own sixty-one of said bonds or notes amounting to $61,000.00. And that $61,000.00 be applied on above.

110 And said First national bank and T. J. Stone agree to take the said sixty-one bonds as above.

It is further agreed that the balance of said bonds or notes be sold at not less than face by First national bank and proceeds applied towards paying the said liens and incumbrances on said mortgaged premises. It is also understood and agreed between the First national bank and myself that as rapidly as the incumbrances are paid off of said lands covered by the mortgage held by the Union Loan and Trust Company, by the said bank or their representatives bonds to cover the said amount or amounts so paid shall belong to the First national bank or their assignee.

D. H. TALBOT.

To balance account to March 15, 1890, I have this day given the First national bank note six months after date with option on or before for the sum of $3,040.30, June 17, 1890.

D. H. TALBOT.

And on the 12th day of November, 1895, plaintiff filed his reply as follows:

Reply.

Comes now the plaintiff in the above-entitled action, and for his reply to defendant's answer to plaintiff's amended and substituted petition, denies each and every allegation therein contained, and avers the facts to be as in his petition alleged.

On the 12th day of November, 1895, this cause came on to be heard before W. G. Sears, the referee theretofore appointed by the court, whereupon the following proceedings were had and evidence produced, offered and introduced, and objections made and exceptions taken as shown by the bill of exceptions herein, which has been duly filed in said court and made a part of the record
111 in said cause, and the following is a complete abstract of all the evidence introduced and objections and exceptions taken thereto.

Plaintiff's Evidence.

D. H. TALBOT, being sworn on behalf of the plaintiff, testified: I am the plaintiff in this case. In my dealings with the defendant bank, commencing about January 1, 1886, I had a pass book and that pass book was used for the keeping of the accounts in connection with the bank, or debits and credits. The paper marked "1" is the account I speak of.

Those entries were made January 1, 1886, and the subsequent entries in that paper were made at the time of the transaction set out in the pass book, and of the transactions as they occurred from day to day. Those entries were made by the defendant, The First National Bank. I suppose those items of entry are correct. This book is the ordinary pass book used under like circumstances, and the entries made by the bank, and at the time of deposits, and the charges of checks and amounts, made and delivered to me from time to time during the running of the account.

Paper marked "1" is now marked "Exhibit 1," and same is offered in evidence. Defendant objects to the introduction of the pass book as immaterial and irrelevant to the present issue, inasmuch as all the items of checks and deposits and balances are alleged in detail in the amended and substituted petition, and admitted by the answer; therefore there is no issue over these items, and the evidence therefore must be immaterial and irrelevant. Objection overruled. Defendant excepts.

This paper marked "2" is a continuation of my account with the defendant, set out in my petition.

Paper "2" is offered in evidence and marked "Exhibit 2." (Same objection as last above. Overruled. Defendant excepts.)

112 Paper No. "3" is a continuation of my account with the defendant, set out in my petition.

(Paper marked "3" is now offered in evidence and marked "Exhibit 3." Objected to as last above. Overruled. Defendant excepts.)

This defendant was an incorporated national bank, doing business as such during all the time from and after the 1st day of January, 1886, down to the time of the commencement of this suit. The decree entered against me on the bonds, and one promissory note for $3,000 and upwards, secured by a mortgage, was rendered on the 23d day of December, 1893. I don't remember the exact amount, it was something like ninety-five thousand. Under that decree there was a foreclosure against several thousand acres situated within and near this city, in Woodbury and Plymouth counties, this State. Under that decree the property, amounting to about 716 acres, was sold. The first sale of 676 acres was made upon the 19th day of March, I believe, in 1894, and the 40 acres remaining of that tract was sold in the early part of July, 1894. The remaining lands, amounting to about 3,764 acres, situated in Plymouth county, was sold, I believe, upon May 17, 1894. I do not know the exact amount for which they were sold, but they were purchased by T. J. Stone, as trustee for the First national bank. I can find the exact amount, but do not know now. I understand it was $87,000. This sale was made to satisfy my indebtedness as evidenced by that judgment. It was the same indebtedness set out and described in my petition in this case. Paper "4" and the several sheets of which it consists were delivered by the bank at the time the pass book was returned, as we presume, about the time they were made up.

Q. What do they show?

(Objected to, as they will show for themselves.)

113 The First national bank promised me those items contained in paper No. 4, as statements of the account from time to time, as it existed between the bank and myself. They returned a slip at a time with the bank book, as my account progressed.

Paper marked "4," with the written statement made in ink, is now offered in evidence as the declarations of defendant.

(Subject to former objections. Overruled. Defendant excepts.)

Cross-examination by Mr. CALL:

I have never figured myself the interest I paid to the bank on overdrafts. I figured the rate taken from a statement which was supported by the checks, made by Mr. Ricketts, and confirmed by Mr. Keefe. I proved about four-fifths of it, I think. There was no arrangement made between myself and the bank, or its officers, as to what rate I should pay on overdrafts. I had no talk with any of them in regard to the rate I was paying or was to pay. They never told me at any time what rate they proposed to charge me or were charging me on overdrafts. I didn't see it from time to time in the pass books, for the reason that it was between Mr. E. H. Stone and myself, on account of the accommodation notes that were being made use of. It was not really a matter that I ever looked into. I never checked up the books. I looked at my pass book but very little. The First national bank kept track of my financial affairs. I never checked off the accounts or balances or anything of that

kind. About all I did was to sign checks, and go in there and make notes whenever he said for me to come, and put up mortgages, which they held continuously as collateral. I gave notes—yes, you might say they were given for the overdrafts. Of course I was supporter of the notes. The accommodation notes were simply given. The accommodation notes were not given in lieu of
114 my own notes and for the same purpose; they were used in the interest of the bank, so the bank could pass the examiner. These accommodation notes were not given by me in payment of my own overdrafts to the bank. My overdrafts were finally paid when the property was taken. They were not settled from time to time on my books at the bank and on my pass book, by credits of these notes. These overdrafts were virtually carried along from time to time on the books as an overdraft, and were never settled up until my property was taken. I know what I am talking about. I know that I made reports continually of all my business, to the First national bank. My account there was carried as an overdraft, continuously, a growing overdraft. It was not reduced by the notes, excepting for the purpose of showing to the examiner the way the thing stood, so they could pass, because it exceeded $10,000, but all the time it was an overdraft above the $10,000. I did not sell any of these bonds made in the spring of 1890 to the bank. The bank wanted to get a little paper for the purpose of presenting itself properly to the examiner; they had already the bonds in their possession. They had at that time $261,000 of the bonds in their possession. I made the bonds at different times, commencing in the spring of 1887, I think it was. There were four different series. They delivered them all to me but the one hundred thousand of bonds, I believe on July 12, 1890, but not at the date the so-called contract was made.

Q. You remember of making a written contract with the First national bank with regard to sale of these bonds, or a portion of these bonds, in June, 1890, don't you?

(Objected to as improper cross-examination, incompetent, immaterial, seeking to introduce a defense on the cross-examination of plaintiff's witness. Overruled. Plaintiff excepts.)

Q. You remember of making that written contract, don't you?

115 A. I signed it but no one else.

Q. Do you remember that in that contract it is provided as follows: "Now, therefore, it is agreed that the said First national bank and T. J. Stone shall have and own sixty-one of said bonds, or notes, amounting to $61,000"?

(Objected to as not the best evidence of what the contract contains.)

Q. You now say that you didn't by that contract sell any bonds to the First national bank or T. J. Stone?

(Objected to as calling for a conclusion. Overruled. Plaintiff excepts.)

—. My understanding of it is that I did not make a sale at that time; not of any bonds. It was only done for that particular purpose of assisting the bank, not for the purpose of transfer, because they held the bonds; held possession of them at that time.

Q. Didn't they cancel and deliver to you all your notes and accommodation notes which they held at that time, at the time they took the bonds?

(Objected to as improper cross-examination, incompetent and immaterial. Overruled. Plaintiff excepts.)

A. They did. There was no consideration for that cancellation. No, sir; I did not regard that as a gift, because they at that time held the mortgage which they had put upon the record without my knowledge and represented to me that they did not have it upon the record. I gave them nothing for those notes which they had cancelled and delivered up. I had nothing to give; they had everything in their possession. No, I gave them nothing for the cancellation of this $61,000 in notes. I had nothing to give. I did not give them the bonds. The bonds were delivered to them before. I did not sell them any bonds for that. It was only done for that particular purpose. They agreed under that statement
116 simply that they wanted the bonds for a form. They did not agree to buy any bonds of me, because they had the bonds in their possession and owned them.

Q. When did the bank become the owner of those bonds?

A. My recollection is they were delivered——

(Objected to as calling for a conclusion of law. Overruled. Plaintiff excepts.)

They were delivered in June, the 7th, I think it was.

Q. They were sold to them at that time?

A. Why, they were sold to them all the time.

Q. Sold to them all the time, were they?

A. Certainly.

Q. When were they sold to them?

A. Sold to them from the beginning.

There was no specified price as to how much they were sold for. There was no agreement as to the price of the $100,000 bonds. The understanding between us was that they were to take these bonds and pay up all the outstanding indebtedness. That was under the agreement of May the 7th, and again May 17th, 1890. They agreed to take up the entire indebtedness on the property and all my outstanding indebtedness and take the bonds and carry them and see that I was kept from—not put under duress on account of this indebtedness, these bonds. There was an understanding prior to that contract of May the 17th. My recollection is, when they agreed to take up all outstanding indebtedness, and therefore these bonds were to be delivered over to them and they were to carry them. There was nothing said about the selling, nothing of the sort, except that

the bank was under duress. We figured, Ed. Stone and T. J. Stone, and Ed. and I particularly, that the bank must get that matter fixed up so they could get a new charter. They could not get a new charter until they did that.

Q. Now, do you say you sold those bonds to the bank at
117 any time so that the bank became the owner of them?

A. Except in the first, just as everything else had been between us.

Q. Well, answer that question yes or no.

A. Never with intention.

Q. Never with intention of selling them to the bank?

A. No, sir. I never sold any bonds to the bank only to carry out that original arrangement. I simply loaned it to them. They became the owners of the bonds simply by possession.

Q. They were in your possession originally, were they not?

A. Yes, I suppose so; that is——

Q. Well, how did the bank get to be the owners of them, if you say they were the owners of them?

A. They were simply put in, you might say, as a substitute. I never parted with the ownership of the bonds until they took possession of them. I presume I parted with the ownership of them then, but it was not by agreement with them.

Q. Well, the bonds I am talking about, made in the spring of 1890. I am asking you if you agreed to sell any part of these bonds to the bank?

A. They were to be disposed of if the bank had to; the prior bonds, whenever these things were cleaned up.

Q. I am talking about those bonds made in the spring of 1890, and I am asking you if you sold any of those bonds to the bank or agreed to sell any of them to the bank?

A. The bank owned the bonds and were to pay up all my outstanding indebtedness. I presume they owned the bonds. They became the owners of the bonds by an agreement that they would take up all my outstanding indebtedness. I do not know as they bought the bonds from me; they took possession of the bonds, put
the mortgage upon the record, represented to me falsely that
118 it was not upon the record; got me to make this so-called
contract fraudulently, with a view to passing the examiner, so they could put these new bonds in there with more degree of title.

I did not sell any of the bonds to the bank. They were mere accommodation notes in continuation of my indebtedness.

Q. That is what I want to know—whether when the bank cancelled your notes you agreed to give them a certain amount of bonds in payment?

A. These bonds—we agreed before this time, at several times, that they would deliver over these securities to me—these accommodation notes, because they themselves claimed they didn't want them any longer. They could not get Mr. Lewis to make a new endorsement, and——

Q. When you had your own notes and these accommodation notes

cancelled and delivered up, did you give them any bonds in payment of them?

A. I gave them those bonds as a substitute for a new line of indebtedness; not that it was changed whatever, for there was no difference in the amount of money delivered to me, not a cent; I never got a cent out of it. I didn't know then at that time that he had so played the traitor; after I had saved the bank from going to the wall. I put in money and saved them from——

Q. When did you put any money in?

A. I put in money twice to help the bank——

Q. When did you put any money in?

(Objected to. Sustained.)

Q. When do you claim, Mr. Talbot, that you paid any interest on overdrafts?

(Objected to as improper cross-examination. Witness has not testified that he paid, except that his property was sold. Overruled. Plaintiff excepts.)

119 A. When the property was sold; not prior to that time. I paid interest on the overdrafts at different times, which were merged into the several renewal notes, which finally, as a new form of renewal notes, were merged into the mortgage which was foreclosed and the property taken from me under the execution. I know that interest upon overdrafts was included in the decree of foreclosure against me. I know it by computation.

Q. Do you know anything about the ruling or decision of the judge upon that question?

(Objected to as not proper cross-examination, incompetent, immaterial; the rulings of the judge are evidenced by more solemn proof than oral testimony. Sustained.)

Q. Do you know whether or not this item of interest on overdrafts was included in the decree by the court?

(Objected to as incompetent, immaterial and not proper cross-examination. Overruled. Plaintiff excepts.)

A. It was in part only.

Q. To what extent?

A. My recollection is——

(Objected to as incompetent, immaterial and asking that it be stricken out. Overruled. Plaintiff excepts.)

Q. To what extent was interest on overdrafts included in that decree?

(Objected to as incompetent, immaterial and not the best evidence. Overruled. Plaintiff excepts.)

A. I cannot say exactly from memory as to just what percentage of it was included in the decree.

Witness excused.

J. B. KEEFE, being first duly sworn, testified as follows:

I am a book-keeper and accountant by occupation. I have made an examination of the transactions between the plaintiff and the defendant, set out in the petition in this case. I have exam-
120 ined the items of overcharge and the items of the interest charged upon overdrafts, contained in the pleadings. To the best of my knowledge my conclusions are correct.

Q. I will call your attention to overdraft set out in the petition during the month of January, 1886, and ask you to state whether you have computed the rate of interest that charge is, as against the daily overdraft during that month.

A. May I refer to memorandum?

Q. You may.

(Defendant objects to this testimony as incompetent and as not being a proper subject of expert testimony, and because the facts and figures are now before the court. Overruled. Defendant excepts.)

A. I have examined the pass book in connection with the statement in the petition and I have examined the pass book in evidence, marked Exhibit "1," and according to the slip returned by the bank the overdraft for the month of January, 1886, according to the bank's statement, was $59,400 for one day. The actual amount of overdraft for that month—I took each particular check drawn for that month, as returned for a voucher by the bank, and arrived at my figures and at the exact amount. The bank's statement generally is approximated, the number of hundreds of dollars, and I took the actual amount, making $59,726.57. That was slightly in excess of what they had charged upon. I found that on February 19, 1886, they charged as interest on that overdraft $16.50; that would be 10.08 per cent. upon the actual amount overdrawn.

In February, 1886, I find the bank returned a slip charging interest upon $36,800 for one day. The exact amount of overdraft was $36,611.74. The bank charged on March 16th $10.20 as interest upon overdraft, being at the rate of 10.2 per cent. upon the actual amount.

The next item of interest upon overdraft was for the month of June, for which no slip or statement from the bank can be
121 found. No amount given. The amount of interest charged in the pass book was $13. The actual amount of overdraft for that month was $52,545.29 for one day; that is the aggregate. The interest charged upon that by the bank was $13; that would be 9.2 per cent. on the actual amount. When I speak of per cent., that is per annum.

The next item of interest I find was charged on August 2d, 1883, of $2.65 for interest on overdraft for the month of July. No slip or statement was returned by the bank of the overdraft for that month and how they arrived at it. I find the actual amount of overdraft to be $9,167.36, therefore they charged interest at the rate of 10.55 per cent. per annum upon the actual overdraft. The $9,167.36 is the aggregate overdraft for the month. I mean $9,167.36

is the aggregate for the whole 31 days in the month; then you should compute interest upon that for one day. The average actual overdraft would be one-thirty-first of that; that is the aggregate overdraft for the entire month. The idea is to take the overdraft for each day, add it up, which gives the aggregate, and on that aggregate compute the interest for one day, which gives the correct interest. I took into account the actual number of days in the month and the actual number of days in the year, and the actual amount overdrawn, and not approximated, as the slips from the bank would show, and upon that basis I figured. I figured this account upon that basis, and all my findings and statements with reference to the interest and computations made, were made upon that basis I speak of.

The next item was charged on September 16, 1886, of $5.30 for interest upon overdrafts for the month of August. No slip or statement from the bank can be found as to how they computed it. The actual amount overdrawn I find to be $19,462.54, making the rate on actual overdraft, as charged by the bank, 9.5 per cent.

122 The next item is the charge on October 21st, $1.10 for overdraft during the month of September. No statement can be found in the bank. I found the actual overdraft to have been $7,215.27, therefore they charged only 5.5 per cent. upon the actual overdraft, and that is the lowest amount that appears.

The next item was charged on December 18th, of $8.45 for interest upon overdraft for the month of November, 1886. No statement can be found in the bank. I find the actual amount of overdraft to have been $30,701.45 for one day. The rate per cent., therefore, charged by the bank upon the actual amount, was 10.4 per cent.

The next item was a charge of $19.52 on January 22, 1887, for interest on overdraft during the month of December, 1886. The overdraft, as shown by statement from the bank's slip, was $70,285. The actual amount was $70,211.46. The bank, therefore, charged 10.14 per cent. upon the actual overdraft. The slip I speak of as coming from the bank, is one of those contained in paper No. 4 in evidence. The interest was for one day, and the $70,211.46 is the amount for one day. The average actual amount was one-thirty-first of that in December, there being thirty-one days. In every case where I speak of the amount of overdraft, I mean the aggregate amount during the month, for one day, being the easiest way to compute it.

The next item I find was charged on February 22, 1887, $33 for interest on overdraft during the month of January, 1887. No slip can be found for this. The amount is made in the bank book marked "interest," I believe, and the actual average overdraft during that month was $118,418.22 for one day, as I stated before, and the rate of interest on the actual overdraft was $10.17 charged by the bank.

123 The next item I found was charged in March, 1887. The charge was made on the bank book. No slip can be found. The actual overdraft for that month was $163,110.46, the bank

having charged $45.72 interest, which was at the rate of 10.23 per cent. on the actual overdraft.

The next charge was for the month of April, 1887, $63.55. No statement can be found. The actual overdraft was found to be $216,757.25. The rate, therefore, charged by the bank, was 10.7 per cent.

The next item was charged in May, 1887, on the pass book, of $57.94, for interest during the month of April. The actual overdraft during the month of April, the aggregate amount, was $205,491.18. The bank, therefore, charged 10.22 per cent. upon the actual overdraft.

The next item is the charge on June 17, 1887, of $25.11 for interest on overdrafts during the month of May, 1887. The actual amount of overdraft was $88,309.64. The bank, therefore, charged 10.37 per cent. upon the actual overdraft.

During the month of July there was a charge of $59 made in the pass book for interest on overdraft during the month of June. The actual amount of overdraft aggregated $210,326.45. The bank, therefore, charged at the rate of 10.23 per cent. on the actual overdraft.

When I speak of 10.23 I mean per annum, and whenever I have spoken of that I meant per annum.

The next charge was made in August, $87.05. The amount of overdraft, actual amount, was $310,624.30; the bank, therefore, charged at the rate of 10.22 per cent.

The next item I find charged in September, 1887, $106.20 for interest on overdraft during the month of August. The actual amount of overdraft was in the aggregate $376,156.95; the bank, therefore, charged at the rate of 10.3 per cent.

The next item charged was in November, amounting to $108.47, being interest on overdrafts for the month of September.
124 The actual amount of overdraft during the month of September being $380,929.90, the rate of interest, therefore, charged by the bank was 10.39 per cent. on actual overdraft.

On the same date, November, 1887, there was charged $43.89 for interest on overdrafts during the month of October. The actual amount of overdraft for that month was $147,868.15; the bank, therefore, charged at the rate of 10.83 per cent.

The next charge I find in January, 1888, $110 interest on overdraft during the month of November, 1887. The actual overdraft during that month was $383,159.57; the bank, therefore, charged at the rate of 10.52 per cent.

Q. Where did you say the actual overdraft was in that amount; you don't mean that was the actual overdraft, do you?

A. I mean the actual aggregate overdraft for one day.

Q. I wish you would be a little more specific in your statement, so that in reviewing this hereafter, whoever may have it may understand it. Of course we understand it here, but in reviewing, the court might not understand it.

—. The next item was charged on the same date, January, 1888, for interest on overdrafts during the month of December, $170.19; the

actual amount of overdraft in the aggregate for one day during the month of December was $598,489.95; the bank charged, therefore, at the rate of 10.30 per cent. on the actual overdraft for that month.

The next charge was in May, 1888, $202.16 being charged for interest on overdrafts during the month of January, 1888. According to the statement furnished by the bank the overdraft amounted to $727.80, in the aggregate for one day. I find the actual amount to have been only $706,894.15 in the aggregate for one day. The bank, therefore, charged at the rate of 10.46 on the actual overdraft.

In speaking of the slip charged first by the bank, I have
125 reference to one of the slips contained in Exhibit No. "4."

The next charge was made on the same date, May, 1888, $225.50 for interest upon overdraft during the month of February, 1888. The bank charged, according to their statement, being part of Exhibit No. "4," $811,000 in the aggregate for one day. The actual amount in the aggregate was $779,508.58. The bank's charge, therefore, was at the rate of 10.58 per cent. per annum.

The next charge was made also in May, 1888, and was $207.97 for interest upon overdraft during the month of March, 1888. The bank's statement, according to Exhibit "4," shows $748,600 as the aggregate amount of overdraft for one day; the actual amount was $729,993.54 in the aggregate for one day. The bank's charge upon the actual overdraft was at the rate of 10.42 per cent.

At the same date, May, 1888, there was a charge of $6.93 for interest upon overdraft for the month of April, the bank statement in Exhibit "4," showing the overdraft to have been $24,900 in the aggregate for one day. I find the actual overdraft to be $24,958.49 in the aggregate for one day. The bank charged, nevertheless, at the rate of 10.18 per cent. on the actual overdraft.

In the month of June, 1888, there was a charge of $8.50 for interest on overdraft during the month of May, 1888. No statement found from the bank. The actual amount of overdraft in the aggregate for one day was $26,198.75. The bank, therefore, charged upon the actual overdraft at the rate of 11.87 per cent.

The next item was charged on August 11th $1.00 for interest upon overdraft for the month of July, and the bank's slip showing an overdraft of $3,800 in the aggregate for one day. The actual amount was $3,551.58 in the aggregate for one day. The bank, therefore, charged upon the actual overdraft at the rate 10.3 per cent.

126 The next charge was made October 19, 1888, $5.28 for interest upon overdraft during the month of August, 1888, the bank's statement showing the overdraft to have been $19,000 for one day in the aggregate. The actual amount was $19,600.83. The rate of interest charged upon the actual amount, therefore, was 9.86 per cent.

On the same date, October 19th, there was charged $29.11 for interest on overdraft during the month of September, the bank's statement showing an aggregate overdraft for one day of $104,900.

The actual amount for one day would be $105,084.56, but, nevertheless, the bank's rate is 10.1 upon the actual overdraft.

On November 22d there was charged $38.33 for interest on overdraft during the month of October, the bank's statement showing the overdraft for the aggregate for one day to have been $138,000. The actual amount was $144,912.37, therefore their charge upon the actual amount was only 9.65 per cent.

The next item charged was December 14, 1888. The charge was $31.97 for interest upon overdraft during the month of November, 1888, the bank's statement showing the aggregate amount for one day to have been $115,100 for one day, but the actual amount was $114,165.29. The bank's charge on the actual overdraft was, therefore, at the rate of 10.25 per cent.

The next series of items were charges on March 25, 1889, $56.17 for interest on overdraft during the month of December, 1888. The bank's statement claims $202,200 was the overdraft for one day. The actual overdraft was $199,738.19 in the aggregate for one day. The bank's charge, therefore, was at the rate of 10.29 per cent. upon the actual overdraft.

The next item, same date, was $84.58 interest on overdraft during the month of January, 1889. The bank's statement in Exhibit "4," as all the rest of the statements are, shows $304,500 as the overdraft for one day. The actual overdraft for one day was only $301,233.07. The bank's charge, therefore, upon the actual overdraft, was 10.21.

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The next item, same date, March 25, 1889, was $39.10 for interest charged on overdraft for the month of February, 1889, the bank's statement showing $140,700 as the aggregate overdraft for one day. The actual overdraft for one day was $137,560.81. The bank, therefore, charged at the rate of 10.38 upon the actual overdraft.

The next charge was on June 19, 1889, $35.25 for interest on overdraft during the month of March, 1889, the bank's statement showing $126,900 as the aggregate overdraft for one day. The actual amount was $122,791.90 for one day. The bank, therefore, charged upon the actual overdraft at the rate of 10.47 per cent.

On the same day, June 19, 1889, there was charged $35 for interest on overdraft during the month of April. The bank's statement shows $125,900 as the amount of overdraft for one day, and the actual amount was $117,232.53. The bank, therefore, charged at the rate of 11.2 per cent.

On the same date, June 19, 1889, there was charged $42.27 for interest on overdraft during the month of May, 1889, the bank's statement claiming $152,200 as the total amount of overdraft for one day. The actual overdraft was $145,013.44. The bank's charge of interest on the actual overdraft was at the rate of 10.63 per cent.

The next item was charged on July 20, 1889, $5.11 interest on overdraft for the month of June, 1889, the bank's statement claiming the overdraft was $18,400 for one day. The actual amount was $15,473.38. The bank's charge on the actual amount was, therefore, at the rate of 12.05 per cent.

On September 9th there was a charge of $6 for interest on
128 overdraft during the month of July, the bank's statement claiming $21,700 overdraft for one day. The actual amount was $21,342.88 for one day. The bank's charge, therefore, was at the rate of 10.26 per cent.

On the same date, September 9, 1889, there was a charge of $6.03 interest upon overdraft for the month of August, 1889, the bank's statement claiming $21,700 as the overdraft. The actual amount of overdraft was $21,342.88. The bank, therefore, charged at the rate of 10.31 per cent. on the actual overdraft.

The next item was charged on November 22, 1889, $6.66 for interest on overdraft during the month of September, the bank's statement claiming $21,000 for the overdraft. The actual amount of overdraft for the month was $20,654.40. The bank, therefore, charged at the rate of 11.76 per cent. upon the actual amount of overdraft.

On the same date, November 22, there was a charge of $5.03 for interest on overdraft during the month of October, the bank showing $18,100 overdraft. The actual overdraft for the month was $18,171.11. The bank's rate of interest on the actual amount was, nevertheless, 10.1 per cent.

On December 11th there was a charge of $2.69 for interest on overdraft during the month of November, the bank claiming the aggregate overdraft for one day as being $9,700. The actual overdraft for the month was $9,410.10. The bank's rate of interest, therefore, on the actual overdraft, was 10.42 per cent.

On January 2, 1890, there was a charge of $2.80 for interest on overdraft during the month of December, 1889, the bank statement claiming $10,300 for one day as overdraft. The actual amount was $9,723.77. The bank, therefore charged upon the actual overdraft at the rate of 10.51 per cent.

On February 22, 1890, there was charged $3 as interest
129 during the month of January, 1890, the bank statement showing $10,850 overdraft for one day. The actual overdraft for the month was $9,723.77. The bank's rate of interest upon the actual amount was at the rate of 11.26 per cent.

The next item was March 20, 1890, a charge of $2.72 for interest on overdraft during the month of February, 1890. The bank's statement shows an overdraft of $9,800 for one day, the actual amount being $8,782.76. The bank's charge on the actual amount was, therefore, at the rate of 11.33 per cent.

The next item was on April 25, 1890, $3 for interest on overdraft during the month of March, 1890, the bank claiming $10,800 overdraft for one day, and the actual amount being $9,723.77. The bank, therefore, charged on the actual overdraft at the rate of 11.26 per cent.

Wherever I speak of the rate charged as interest for overdrafts I have referred in each instance to the rate per annum. I found the total amount of interest charged in the account of overdrafts as returned by the statements received from the bank and the pass books to have been $2,079, and I find in many instances that the charge

for interest on overdrafts was charged in the following month into the overdraft of the following month and entered into their system of overdrafts.

I went into the question of the interest carried into the account upon notes given by the plaintiff to the defendant, which finally were carried into the bond, as deeply as possible, and on that same sheet I noted wherever possible the disposition of those charges of interest, what finally became of them.

Q. What was the amount of interest, as computed by you, upon the various notes given and renewed down to the time of the delivery of the bonds?

130 (Objected to as being immaterial and irrelevant in any view of the case, and for the reason that there is no complaint of excessive interest upon those notes, and according to the allegations of the amended petition and testimony of the parties; they pertain to other transactions between the plaintiff and defendant and do not and cannot enter into the calculations of this suit. Objection overruled. Defendant excepts.)

A. I find the total amount of interest charged down to March 15, 1890, which I think was the date of the bonds, to be $14,969.95. That includes interest on overdrafts and the compounding of the overdraft interest.

Q. What, from your examination and computation, do you find was charged as interest upon the bonds and mortgage for three thousand and some odd dollars, executed at the same time or about the same time the sixty-one thousand of bonds was, down to December 23, 1893. I think that was the time it went into judgment, wasn't it?

A. In arriving at that amount I will state that I will compel the court to give that from the copy of that final decree. You will see it stated in the petition also; the amount of interest on the sixty-one thousand dollars is shown to be $17,689.29. The amount of interest on the note of $3,040.38 from March 15, 1890, to December 23, 1893, according to that final decree, was $938.78, and there was a charge of taxes and mortgages paid amounting to—there was a charge for interest on coupons as if bonds had been taken for the taxes and mortgages.

Q. What was the total amount of interest charged in all this account made up of interest upon overcharges, interest upon notes and bonds, down to December 23, 1893?

(Objected to upon the ground that it includes many transactions of which no complaint is made in the petition. Overruled. Defendant excepts.)

131 A. $33,598.02, which does not include taxes and mortgages paid and coupons.

Cross-examination:

I made a computation of these various overdrafts as I found them, at 10 per cent. I did not preserve those figures. I made it just for

my own satisfaction at the time, in proving up those other figures. I cannot give them now. I have not presented any figures at 6 per cent. I figured what the interest rate actually was upon the actual amount, taking the amount of interest charged, which gives various per cents. I arrived at the rate per cent. that I have given here on the overdraft in various months, by taking the actual amount of the overdraft in the aggregate for one day, and finding the amount for one year, and dividing the actual amount charged by the bank by that which will give the actual rate per cent. charged and fractions of it.

This statement that I have here on which I figured up the interest on overdrafts at 6 per cent. amounts to $1,203.91. I think that is right; that was my calculation; just so that I could calculate in a moment what the interest would be at 10 per cent. straight, which would be by dividing by this and multiplying by ten. My way of figuring is $2,006.52. The total amount charged by the bank for interest on overdrafts as returned by the bank's statement was $2,079.

Q. And then how much do you claim that to be of an excess charge by the bank, on all their overdrafts, according to the way you have figured it?

A. Well, the $2,079 does not finish with the overdraft interest. From that it went into different notes and different forms and still drew interest.

Q. Well, I am talking about the amount of overcharge, what you claim to be the actual amount of overcharge on all the overdrafts for the series of years; the original overcharge of interest for all these years?

A. $2,079.

132 Q. I say all overcharge; all over 10 per cent. I am not stating what the rate is or should be, whether 10 per cent. or not; we will get at that afterwards.

A. The actual amount of overcharge over 10 per cent.—the difference between $2,006.52 and $2,079, is $72.48.

In figuring upon the actual overdraft for each month, no, I didn't take into account the charge for interest of the previous months, but I find that the bank has done so, in fact computed that interest month after month; that is, they added it each month into the overdraft, and then that and the following interest went into the next month's overdraft and was charged double, was compounded. It was charged in and compounded from month to month. I didn't in any of my calculations count interest upon interest at all; that is on overdrafts. As soon as some entry was made which would wipe out all overdrafts as shown by the bank book, why then I started in new again. I didn't charge it in intentionally in my calculations. I didn't ever calculate interest upon interest into the overdraft.

Q. And now, according to the way the bank figured, they figured uniformly 360 days to the year?

(Objected to as not the best evidence. Overruled. Plaintiff excepts.)

Q. What do you know about it? Do you know the way the bank figured it?

A. In some instances, where there are no slips, I can only guess at their mode of arriving at the interest.

They divided by 360, you know; 360 without the 5. I allowed 365 days and they 360. I think that was the way they arrived at their figuring of it. They approximated the overdraft, taking the nearest hundred, I think.

I didn't see any items smaller, in only one instance; that was a new clerk, I guess.

133 In some instances the slips show that the amount would run for several days, then they would add in the several amounts; and it was by these items and the amount of them in that way that they got a good deal more than they should on overdrafts. I think there was only one month, that was the month of May, as I stated in my testimony, in which the bank didn't charge any interest on overdrafts. May, 1886.

No, there were not three months in the spring of 1889. Beginning with April, 1889, they charged $39; in May, $42.27. There is no charge for interest on overdraft for March, 1890. I do not think there was an overdraft; I am not prepared to state; March 15, 1890, if I am not mistaken, was the date on which the bond matter was straightened up. March 15th, 1890, was the date of those bonds; when that transaction in regard to the bonds took place.

Q. Do you know when his notes were taken up and when the settlement was made—that is, the settlement in which the notes were cancelled and the bonds taken?

A. I know from the figures as shown, that the bonds drew interest from March 15, 1890, and they surely should not draw interest on the same amount at the same time.

Q. But don't you know that is not answering the question?

(Objected to as not proper cross-examination.)

A. That is what I was trying to answer.

Q. I asked if you knew anything about it.

A. I don't positively, no.

I don't know positively when that settlement was made only from statements in the decree and such as that, that I took for granted.

J. B. KEEFE, being recalled, upon his direct examination testified:

Q. Have you compared the amount of interest which accrued upon the sixty-one thousand of bonds mentioned in the
134 petition, from their date and delivery to the date of the decree mentioned in the petition?

(Objected to on the ground previously stated, that it includes many transactions of which no complaint is made in the petition. Overruled. Defendant excepts.)

A. I find some figures in a statement which I think was made

by the bank, and I went over them to verify them and made them practically about the same. The amount charged by the bank was, I think, seventeen thousand and some odd dollars. After refreshing my memory I find the amount was $17,689.29, interest to December 23, 1893.

Witness excused.

D. H. TALBOT is recalled.

Direct examination:

Q. In your cross-examination by the defendant it was sought to show that in the giving of some of these notes that you have testified concerning, mentioned in the petition, and in executing and delivering the bonds, also described in the petition, together with the note for $3,040, that some of those notes and bonds were taken by the bank in payment and to discharge your indebtedness to the bank. Now state whether any note was given by you to the bank, mentioned in your petition, or any bond or any bonds given by you, were given as a settlement and discharge of your indebtedness to the bank.

A. It never was done, nor was it the intention upon the part of either party.

Q. Do you remember the exact amount of the decree or judgment entered against you upon the bonds delivered in June, I think, 1890?

A. No. sir; I have not seen the decree since.

It is hereby agreed between the plaintiff and the defendant that the amount found due in that decree was $94,578.90.

This First national bank is situated in Sioux City, in
135–183 Woodbury county, Iowa, the same county in which this court is located, and it has been situated here and doing business in this county during the happenings of all the events narrated in the petition.

Cross-examination:

Q. Mr. Talbot, will you examine this paper, which we will have marked Exhibit "A," and state whether you executed that and signed it yourself.

(Objected to on the ground of not being proper cross-examination, incompetent and immaterial. Overruled. Plaintiff excepts.)

A. Yes, I signed it.

Witness excused.

Plaintiff rests.

* * * * * * *

184 EXHIBIT "4."

Paper "4."

Talbot, with the First National Bank of Sioux City, Iowa.

Interest acc't for ——, 18—.

Dr.		Cr.	
1			
2			
3			
4		2	
5		4	
6		12	
7		13	
8		9	
9		11	
10		11	
11		12	
12		12	
13		12	
14		18	(Stamp.)
15		18	
16		18	First national bank,
17		18	Sioux City, Ia.
18		18	Feb. 18, 1886.
19		26	Paid.
20		26	
21		26	
21		27	
23	154	27	
24	50	27	
25		27	
26		28	
27		29	
28		29	
29		42	
30		46	
31		46	
		9)59400	
		4)6600	
		1650	

Interest acc't for ——, 18—.

1		4700	
2		49	
3		50	
4		50	
5			
6			
7			
8			
9			
10			
11			
12			
13			
14		37	
15			
16			
17			
18			
19			
20			
21		90	
22			
23			
24		45	(Stamp.)
25			
26			First national bank,
27			Sioux City, Ia.
28			Mar. 16, 1886
29			Paid.
30			
31			
		9)36800	
		4)4090	
		1020	

Debit, Talbot,
June int., $13.00.

Debit, D. H. Talbot,
July int., 2.65.

(Stamp.)

First national bank,
Sioux City, Ia.
Aug. 2, 1886.
Paid.

185 Debit, Talbot,
August —, 5.30.

(Stamp.)

First national bank,
Sioux City, Ia.
Sep. 16, 1886.
Paid.

Debit, Talbot,
Sep. int., 1.10.

(Stamp.)

First national bank,
Sioux City, Ia.
Oct. 21, 1886.
Paid.

Debit, D. H. Talbot.
Nov. int., $8.45.

(Stamp.)

First national bank,
Sioux City, Ia.
Dec. 18, 1886.
Paid.

Interest account for Dec., 1887.

Dr.	Cr.
1	1654
2	1668
3	1858
4	1918
5	1918
6	1828
7	1596
8	1601
9	1786
10	1914
11	1993
12	1993
13	2018
14	2080
15	2089
16	2301
17	2327
18	2437
19	2437
20	2557
21	2672
22	2675
23	2695
24	2725
25	2725
26	2725
27	2779
28	2785
29	2790
30	2841
31	2900
	12)70285
	3)5857
	1952

Debit, Talbot.
May int., 25.11.

(Stamp.)

First national bank,
Sioux City, Ia.
July 17, 1886.
Paid.

Interest acc't for Jan., 188–.

Dr.	Cr.
1	212
2	217
3	219
4	22
5	223
6	224
7	224
8	23
9	231
10	234
11	235
12	235
13	235
14	235
15	235
16	236
17	237
18	238
19	238
20	238
21	239
22	239
23	242
24	244
25	249
26	249
27	251
186	
28	254
29	254
30	255
31	256
	36)7278
	202½
	12)727800
	360650
	202.16

Interest acc't for Feb., 188–.

Dr.	Cr.
1	256
2	258
3	264
4	266
5	266
6	267
7	269
8	271
9	271
10	271
11	272
12	272
13	278
14	279
15	281
16	282
17	283
18	285
19	287
20	287
21	291
22	291
23	294
24	295
25	291
26	291
27	297
28	30
29	305
30	
31	
	36)811800
	2255
	2255(

Interest acc't for M'ch, 188–.

Dr.	Cr.
1	306
2	308
3	314
4	314
5	314
6	319
7	319
8	326
9	326
10	326
11	326
12	33
13	333
14	334
15	327
16	328
17	331
18	331
19	332
20	335
21	335
22	336
23	336
	36)748800
	20797⅓
	20797

Interest acc't for April, 188–.

Dr.	Cr.
1	1
2	1
3	2
4	3
5	3
6	4
7	7
8	7
9	8
10	1
11	11
12	11
13	12
14	13
15	13
16	14
17	17
187	
18	18
19	
20	3
21	3
22	3
23	7
24	8
25	8
26	11
27	12
28	13
29	13
30	13
	36)24900
	69⅔
	693

Interest acc't for July, 18—.

Dr.	Cr.	
1		
2		
3		
4		
5		
6		
7		
8		
9		
10	2	
11	3	
12	4	
13	4	(Stamp.)
14	4	
15	4	Paid
16	5	Aug. 11, 1888.
17	6	First national bank,
18	6	Sioux City, Ia.
	12)3800	
	3)300	
	100	

Interest acc't for August, 188–.

Dr.	Cr.	
1		
2		
3		
4		
5		
6		
7		
8	1	
9	1	
10	1	
11	1	
12	1	
13	1	
14	1	(Stamp.)
15	4	
16	4	First national bank,
17	4	Sioux City, Ia.
18	5	Oct. 19, 1888.
19	5	Paid.
20	1	
21	12	
22	12	
23	12	
24	12	
25	12	
26	12	

27	13	
28	15	
29	18	
30	18	
31	24	
	12)19000	
	3)1583	
	528	

Interest acc't for Sept., 18—.

Dr.	Cr.	
1	24	
2	24	
3	28	
4	29	
5	30	
6	30	
7	30	
8	30	
9	31	
10	32	
11	32	
12	33	
13	32	
14	33	
15	33	
16	33	
188		
17	33	(Stamp.)
18	34	
19	35	First national bank,
20	35	Sioux City, Ia.
21	40	Oct. 19, 1888.
22	41	Paid.
23	41	
24	42	
25	42	
26	41	
27	45	
28	45	
29	45	
30	46	
	12)104900	
	3)8741	
	2911	

Interest acc't for Oct., 18—.

Dr.	Cr.	
1	53	
2	52	
3	56	
4	57	
5	58	
6	59	
7	59	
8	63	
9	63	
10	63	
11	64	
12	64	
13	64	(Stamp.)
14	64	
15	26	First national bank,
16	30	Sioux City, Ia.
17	31	Nov. 22, 1888.
18	32	Paid.
19	35	
20	35	
21	35	
22	36	
23	36	
24	36	
25	36	
26	37	
27	37	
28	37	
29	37	
30	37	
31	28	
	12)138000	
	3)11500	
	3833	

Interest acc't for Nov., 18—.

Dr.	Cr.	
1	28	
2	29	
3	30	
4	30	
5	30	
6	31	
7	32	
8	33	
9	34	
10	34	
11	34	
12	36	
13	39	
14	40	(Stamp.)
15	41	
16	42	First national bank,
17	42	Sioux City, Ia.
18	42	Dec. 14, 1888.
19	42	Paid.
20	42	
21	42	
22	42	
23	42	
24	43	
25	43	
26	44	
27	46	
28	46	
29	46	
30	46	
	36)115100(3197	
	3197	

Interest acc't for Dec., 18—.

Dr.	Cr	
1	46	
2	46	
3	49	
4	49	
5	52	
189		
6	56	
7	59	
8	60	
9	60	
10	61	
11	62	
12	62	
13	63	
14	66	
15	66	
16	67	(Stamp.)
17	67	
18	67	Paid
19	69	Mar. 25, 1889.
20	70	First national bank,
21	71	Sioux City, Ia.
22	73	
23	73	
24	75	
25	75	
26	75	
27	75	
28	75	
29	77	
30	77	
31	79	
	12)202200	
	3)16850	
	5617	

Interest acc't for Jan., 18—.

Dr.	Cr.	
1	79	
2	81	
3	86	
4	89	
5	91	
6	91	
7	89	
8	91	
9	91	
10	94	
11	96	
12	96	
13	96	
14	96	
15	98	
16	99	
17	99	(Stamp.)
18	100	
19	103	Paid
20	103	Mar. 25, 1888.
21	103	First national bank,
22	104	Sioux City, Ia.
23	105	
24	107	
25	207	
26	107	
27	107	
28	107	
29	110	
30	110	
31	110	
	12)304500	
	3)25375	
	8458	

Interest acc't for Feb., 18—.

Dr.	Cr.	
1	112	
2	113	
3	113	
4	114	
5	116	
6	118	
7	120	
8	22	
9	24	
10	24	
11	26	
12	26	
13	27	
14	28	
15	28	
16	28	
17	28	
18	29	
19	29	(Stamp.)
20	30	
21	31	Paid
22	31	Mar. 25, 1889.
23	31	First national bank,
24	31	Sioux City, Ia.
25	32	
26	32	
27	32	
190		
28	32	
	9)140700	
	4)15640	
	3910	

Interest acc't for Mar., 18—.

Dr.	Cr.
1	3300
2	3300
3	34
4	34
5	34
6	35
7	35
8	35
9	40

10	40
11	41
12	41
13	41
14	42
15	42
16	42
17	42
18	42
19	42
20	42
21	42
22	43
23	43
24	43
25	46
26	46
27	46
28	47
29	47
30	48
31	48
	6)126900
	6)21150
	3525

Interest acc't for April, 18—.

Dr.	Cr.
1	3300
2	33
3	33
4	36
5	37
6	40
7	40
8	44
9	44
10	45
11	39
12	40
13	40
14	40
15	41
16	42
17	42
18	42
19	42
20	42
21	42
22	44
23	44
24	45
25	46
26	47
27	49
28	49
29	49
30	49
31	
	12)125900
	3)10500
	3500

Interest account for May, 18—.

Dr.	Cr.	
1	5000	
2	50	
3	50	
4	50	
5	50	
6	51	
7	53	
8	54	
9	55	
10	56	
11	56	
12	57	
13	59	
14	59	
15	59	
191		
16	59	
17	58	(Stamp.)
18	60	
19	61	Paid
20	61	June 19, 1889.
21	61	First national bank,
22	61	Sioux City, Ia.
23	54	
24	57	
25	57	
26	57	
27	58	
28	2	
29	2	
30	2	
31	3	
	6)152200	
	6)25366	
	4227	

Interest acc't for June, 18—.

Dr.	Cr.	
1	2	
2	3	
3	5	
4	6	
5	6	
6	6	
7	6	
8	6	
9	6	
10	6	
11	6	
12	6	
13	6	
14	6	(Stamp.)
15	6	
16	6	Paid
17	6	July 29, 1889.
18	6	First national bank,
19	7	Sioux City, Ia.
20	7	
21	7	

22	7	
23	7	
24	7	
25	7	
26	7	
27	7	
28	7	
29	7	
30	7	
	6)18400	
	6)3066	
	511	

Interest acc't for July, 18—.

Dr.	Cr.	
1	7	
2	7	
3	7	
4	7	
5	7	
6	7	
7	7	
8	7	
9	7	
10	7	
11	7	
12	7	
13	7	
14	7	
15	7	
16	7	
17	7	
18	7	(Stamp.)
19	7	
20	7	Paid
21	7	Sep. 9, 1888.
22	7	First national bank,
23	7	Sioux City, Ia.
24	7	
25	7	
26	7	
27	7	
28	7	
29	7	
30	7	
31		
	12)21700	
	3)1808	
	600	

192 Interest acc't for ——, 18—.

Dr.	Cr.
1	7
2	7
3	7
4	7
5	7
6	7
7	7
8	7
9	7
10	7
11	7
12	7
13	7
14	7
15	7
16	7
17	7
18	7
19	7
20	7
21	7
22	7
23	7
24	7
25	7
26	7
27	7
28	7
29	7
30	7
31	7
	3)21700
	12)7233
	603

Interest acc't for Sept., 18—.

Dr.	Cr.	
1	7	
2	7	
3	7	
4	7	
5	7	
6	7	
7	7	
8	7	
9	7	
10	7	
11	7	
12	7	
13	7	
14	7	
15	7	
16	7	
17	7	
18	7	
19	7	
20	7	
21	7	
22	7	
23	7	
24	7	
25	7	(Stamp.)
26	7	
27	7	Nov. 22, 1889.
28	7	First national bank.
29	7	Sioux City, Ia.
30	7	
31		
	3)21000	
	12)7000	
	666	

Interest acc't for Oct., 18—.

Dr.	Cr.	
1	7	
2	7	
3	7	
4	7	
5	7	
6	7	
7	7	
8	7	
9	7	
10	7	
11	7	
12	7	
13	7	
14	7	
15	7	
16	7	
17	7	
18	7	
193		
19	7	(Stamp.)
20	7	
21	7	Paid
22	7	Nov. 22, 1889.
23	3	First national bank,
24	3	Sioux City, Ia.
25	3	
26	3	
27	3	
28	3	
29	5	
30	3	
31	3	
	12)18100	
	3)1508	
	503	

Interest acc't for ——, 18—.

Dr.	Cr.
1	3
2	3
3	3
4	4
5	3
6	3
7	3
8	4
9	3
10	3
11	3
12	4
13	3
14	3
15	3
16	4
17	3
18	3
19	3
20	4
21	3
22	3
23	4
24	4
25	3
26	3
27	3
28	4
29	3
30	3
	12)9700
	3)808
	269

(Stamp.)

Paid
Dec. 11, 1889.
First national bank,
Sioux City, Ia.

Interest acc't for ——, 18—.

Dr.	Cr.	
1	3	
2	3	
3	4	
4	3	
5	3	
6	4	
7	3	
8	3	
9	3	
10	4	
11	3	
12	3	
13	4	
14	3	
15	4	
16	3	
17	3	(Stamp.)
18	4	
19	3	Paid
20	3	Jan. 8, 1890.
21	4	First national bank,
22	3	Sioux City, Ia.
23	4	
24	3	
25	3	
26	4	
27	3	
28	3	
29	4	
30	3	
31	3	
	6)10300	
	6)1713	
	280	

194

Interest account for Jan., 18—.

350
31

350
1050

10850
12)10850
---
3)900

300

Interest acc't for Mar., 18—.

Dr.	Cr.
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	3500
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	3500
21	
22	
23	
24	
25	
26	
27	
28	
29	
30	3500
31	3
	36)10800

	300

Interest acc't for July, 18—.

Dr.	Cr.
1	3
2	4
3	3
4	4
5	3
6	4
7	3
8	4
9	3
10	4
11	3
12	4
13	3
14	4
15	3
16	4
17	3
18	4
19	3
20	4
21	3
22	4
23	3
24	4
25	3
26	4
27	3
28	4
	12)9800
	---
	3)816

	272

195 *Defendant's Evidence.*

E. H. STONE, called on behalf of the defendant, being duly sworn, testified:

I reside in Sioux City, Iowa; am cashier of the First national bank. Have been cashier of the First national bank about ten years. During that time I have had part of the management of the affairs of the bank and have been active in the management of the bank during the times of which the plaintiff has testified, when he was doing business with the bank. I have knowledge of the mode of charging interest upon the overdrafts that has been adopted and practiced by the bank during those years. During that time the

bank had a uniform custom and practice in that regard, as to all customers of the bank.

Q. And do you know whether that custom and mode of charging interest on overdrafts is universal among the banks throughout the city? Was at that period and since?

(Objected to as incompetent, immaterial and irrelevant. Overruled. Plaintiff excepts.)

A. Yes, sir; I think nearly all the banks. I think every one of them figures interest the same way we do.

(Asked to be stricken out as incompetent, immaterial and irrelevant. Overruled. Plaintiff excepts.)

Q. State — the mode of computing interest on the plaintiff's account was any other or different from that of the other customers of the bank.

(Objected to as incompetent, immaterial and irrelevant. Overruled. Plaintiff excepts.)

A. It was charged in the same way exactly as all other depositors who had overdrafts.

(Plaintiff moves to strike out the answer as incompetent, immaterial and irrelevant. Overruled. Plaintiff excepts.)

Q. And now will you state the mode in which it was the usual custom of the bank to charge interest upon overdrafts, and
196 the way in which interest was charged on the overdrafts of the plaintiff.

(Objected to as incompetent, immaterial and irrelevant. Overruled. Plaintiff excepts.)

A. The overdraft for each day in the month was footed up in total—that is, a month's overdraft was figured up, and upon that total the interest was figured for one day at the rate of 360 days to the year.

Judge PHELPS: On the basis, I suppose?

A. Yes, on that basis; yes, sir.

(Continuation of previous answer:) Our book-keeper was instructed to charge interest at the rate of ten per cent. on such overdrafts.

Q. During what period?

(Plaintiff moves to strike out the testimony in reference to instructions to the book-keeper as incompetent, immaterial and irrelevant. Overruled. Plaintiff excepts.)

A. During the period in which Mr. Talbot had transactions with the bank.

Q. Is this figuring of interest done by the officers of the bank or by book-keepers?

(Objected to as immaterial. Overruled. Plaintiff excepts.)

A. Done by the book-keepers.

Q. And did those book-keepers have any instructions from the officers, or directors, or management of the bank to charge more than ten per cent. in any case at any time, or in the case of plaintiff?

(Objected to as incompetent, immaterial and irrelevant. Overruled. Plaintiff excepts.)

A. They never had instructions to charge more than ten per cent. to any one party on overdrafts.

Q. Did the manager of the bank, officers or directors have any knowledge that any charge in excess of that amount was made by the book-keeper?

197 (Objected to as incompetent, immaterial and irrelevant. Overruled. Plaintiff excepts.)

A. No, sir.

Q. The plaintiff has alleged, and has also testified, that at the various times throughout his business relations with the bank, he executed notes and furnished accommodation notes to the bank; you may state whether these notes were credited to the plaintiff's account at various times they were given and accepted as payment for the amount they represented.

(Objected to as leading and calling for a conclusion of the witness. Overruled. Plaintiff excepts.)

A. They were.

It is not true that these notes were not given in payment of his overdraft at any time and that his indebtedness at all times was represented by his overdraft and that these notes were simply given for the accommodation of the bank and were not given or taken as payment of any amount on the overdraft. When the notes were first taken they were credited to his account and reduced his overdraft the amount of each note as it was credited.

I have examined this paper marked Exhibit "A," being agreement signed by Mr. Talbot.

Q. At that time were all matters between the plaintiff and the defendant settled in accordance with terms of this contract?

(Objected to as leading, incompetent and immaterial. Overruled. Plaintiff excepts.)

A. Yes, sir.

Q. That is, do you mean to say that the settlement was carried out in all respects as agreed upon?

(Objected to as calling for a conclusion and leading. Overruled. Plaintiff excepts.)

A. We bought sixty-one thousand of those bonds outright
198 and took his note for $3,040.38 for the balance due us.

Q. And in that purchase were all other claims against the plaintiff cancelled and delivered?

(Objected to as leading. Overruled. Plaintiff excepts.)

A. All the claims that the bank owned were surrendered at that time.

Cross-examination.

By Judge PHELPS:

Q. Were the charges for interest on overdrafts included in the notes taken by the bank from Mr. Talbot?

A. It took notes and credited his account in place of the notes. Interest was not included, as far as I understand it.

Q. The interest on the overdrafts?

A. No, sir.

Q. When the account has run there overdrawn, and the amount found due upon your books for overdrafts and interest on overdrafts, was not the interest and the overdrafts included in the amount for which notes were taken?

A. I think in almost every case there was sufficient left in the overdraft to cover any interest that might be charged to his account. Once or twice his account was balanced by notes.

Q. When his account was so balanced by note, did not the account include interest upon overdrafts?

A. I suppose in a general way it would be included.

When these notes were executed to balance his overdraft account, either Mr. Galbraith, or myself, or my father, received and accepted such notes for the bank. My father and Mr. Galbraith and myself are officers of the bank.

Q. At the time of the acceptance by the bank of such notes, the officer accepting them had a knowledge of the overdraft and items of overdraft, interest and the like, did they not?

A. They knew that interest had been charged to the account, or supposed it had.

199 The account was computed by a book-keeper employed by the bank.

Q. Mr. Stone, is it not true that when the first note given by Mr. Talbot, mentioned in the petition, was past due, that the amount of that was charged back into the overdraft account?

A. What is the date of that note?

Q. About November 1st, 1887.

A. That note was paid November 14th, 1887.

Q. Is it not true that that note became past due and that it was charged back into the overdraft account?

A. It went into the account November 14th, 1887; I think Mr. Talbot gave a check for it; I am not sure.

Q. Did it not go into the overdraft account—charged back into the overdraft account?

A. It increased the overdraft $10,000.

Q. Then as a matter of fact the exact amount of that note, with the interest accrued upon it, instead of being paid to you that day, was charged back to his overdraft account?

A. It increased his overdraft account $10,000.

Q. Was it charged back?

A. It was charged back in the shape of a check or a charge.

Q. As a matter of fact it appears upon your books as a charge in the overdraft—as an increase in the overdraft?

A. Yes, sir.

Q. Then he didn't pay that money on that day?

A. No, sir.

He didn't have any money in the bank to pay it with. He gave a check; it was a check without account in the bank to pay it with, and that is the true condition of that amount represented by that $10,000 note. On the day when it was past due—on this 14th day of November, 1887, his overdraft was, including this amount, something over $17,000. I do not think this transaction with
200 reference to this $10,000 note a fair example of subsequent notes given. The accommodation notes given by Miss Scott and others were renewed from time to time and given to Mr. Talbot when this settlement of June 17th, 1890, was made. On June 17th, 1890, none of these accommodation notes, or notes that we then held against Mr. Talbot, were paid with money. We paid the bonds of Mr. Talbot and paid for them that way.

Q. That is, you delivered up the notes to him, and you held in your possession, and had for some time, $100,000 in bonds, secured by real-estate mortgage?

A. We took and owned $61,000 of the bonds from that date, which was the understanding according to the contract.

Q. And that $61,000 covered the larger part of his indebtedness to you on that date?

A. That was the way we paid for the bonds.

His indebtedness to the bank was evidenced in full by the $61,000 in bonds and the note for $3,040.38.

Q. Then the bank on that 17th day of June, 1890, became the owners of the $61,000 of bonds and the note for $3,040.38 and continued the owner of it until it was put into a decree and judgment?

A. No, sir; father owned all but $10,000; father afterwards bought all but $10,000 of those bonds and he was the owner, about that.

My father that I speak of was the president of the bank. I think he was cognizant of all the dealings between the bank and Mr. Talbot, and had full knowledge of the indebtedness from time to time from the begining of our transactions down to the final closing up, as far as it has been closed up. He was at that time and for a long time had been and now is, the president of the bank.

Q. Now I will call your attention to the $10,000 note dated March 23, 1888, being one of the accommodation notes signed by
201 George P. Day. Now when that became due, or past due, and on July 18, 1888, was not the amount of that note charged back to the overdraft account against Mr. Talbot?

A. July 19th it was paid by check of Mr. Talbot, No. 3880.

Q. But Mr. Talbot didn't have the money there to pay it, did he?

A. His account was credited that day after that was charged in; he had $1,928.37 to his credit after that was charged in.

Q. How was that credited; with what was the account credited to leave that balance?

A. Our books show that he was credited with $13,269.39 the same day. I don't know of what that credit consisted. It don't show whether it was made up of notes deposited or not; no record on our books to show what it was; that is, on our journal. I don't know how many notes we held against him on that day. We held some notes against him on that day.

Q. How many?

A. I think we held all that were turned in.

Yes, sir, he was largely indebted to the bank on that dry. We had other notes. He was indebted to the bank in the sum of a good many thousand dollars on that day, which was represented by those notes and the accommodation notes. As a matter of fact, his indebtedness is not shown by the account wherein he is credited with a balance, the balance I have spoken of. The account was represented by notes and also by an overdraft.

Redirect examination by Mr. CALL:

Q. You say that all of these bonds, excepting $10,000, were sold to your father, T. J. Stone?

A. I think three or four thousand were held by the bank outside of their listed assets.

202 It does not show whether it was in the profit and loss account; it does not show on our books at all. Outside of these the remainder of the $61,000 were sold to Thomas J. Stone, my father. That sale was made subsequent to our taking the bonds. Just when it was I don't know. It was during the same year, 1890. The bank did not afterwards become the owner of them at any time.

In the purchase of the property at sheriff's sale, the bank did not acquire any greater ownership in the share of the bonds purchased.

I have drawn off on this statement furnished by Mr. Keefe the total overdraft as shown by the books of the bank from month to month, placing figures opposite to the per cent. as he has figured it from Mr. Talbot's pass book and from the actual balance as it appears on our books.

I have placed it opposite his figures which he obtained from Mr. Talbot's pass book and have taken the amount as shown by our books, and have carried out the item for each month in a total overdraft. That statement is correct—from our books.

(Statement marked Exhibit "B" is offered in evidence.)

Recross-examination by Judge PHELPS:

I suppose this Exhibit "B," except the last column of figures, contains a tabulated statement of Mr. Keefe'e testimony with reference to the balance and the computation of interest. He handed it to me; I have not compared it; I don't know.

(It is hereby agreed by plaintiff and defendant that it is a tabulated statement furnished by Mr. Keefe, and is a tabulated statement

of the testimony given with reference to the items, except the last column, which is in figures in pencil, made by the witness E. H. Stone; and it is agreed that this be received in evidence and made a part of the record.)

Redirect examination by Mr. CALL:

This bundle of papers marked Exhibit "C" is an abstract of
203 the account of Mr. Talbot from January 1, 1886, to the close of the account, showing all items of debit and credit, with balances for each day. It is correctly drawn from our books, and this schedule correctly shows his account with the bank for those years in every particular.

Exhibit "C" is offered in evidence.

Recross-examination by Judge PHELPS:

This table was made up since the beginning of this suit, not since the testimony of Mr. Keefe yesterday; prior to that date. The pass books used between the bank and the plaintiff should agree with the items of account in that statement as they occurred. The pass book was made by the employees of the bank, and this statement was made by the employees of the bank.

Q. Does this statement contained in this Exhibit "C" correspond with the original entries of account made at the time each item mentioned herein arose?

A. The instructions to our employés was to make it such an abstract, and I think it is.

Q. Do you know that it is such an abstract?

A. I haven't examined each item, so that I could not say that it is, but I know—

(This Exhibit "C" is objected to on the ground that no sufficient foundation is laid for its introduction. Overruled. Plaintiff excepts.)

Q. Now, since the commencement of this suit, have you not for the bank, or has not the bank caused to be made a refooting and computation and statement of the account between the bank and Mr. Talbot?

A. In what way?

Q. In any way.

A. I don't think that it has. I suppose you refer to the totals of the overdraft each day, don't you?

Q. I refer to any item that may appear there. I am trying to find out whether there has been any alteration in that account.

204 A. Not that I know of.

Q. Do you know whether this contains a statement of the aggregate amount of the overdrafts as they originally appeared on your books?

A. Yes, sir.

Q. Do these items agree with the original items as entered upon the bank's books at the time the charges for interest were made?

A. Yes, sir. I will say that there may be a difference of a date; a transaction may have been late in the afternoon and may not appear on our statement until the next morning, thus making the difference of a day; it may be entered on his pass book today and on our book tomorrow.

Q. And the pass book that was given to him, and all the pass books given to him containing these items of account were made up from your books, were they not?

A. They were both made from the same ticket; they should agree. The pass book first and the bank's books subsequently. The original entries of these charges and accounts were originally made on that ticket. They are both taken from the original ticket. Sometimes they were first transcribed into the pass books and afterwards into the bank's books, and sometimes the reverse. My belief is that they were correct wherever made; that the pass book and this abstract will agree, and if they do not agree it is because of errors committed by our book-keeper and not by anybody else.

Q. Now, isn't it true that the reason of your father taking these bonds that you have spoken of was, that under the national bank act a national bank is not allowed to have more than a claim of ten thousand dollars against one person, and that your father was obliged to take those in order to protect the bank?

A. The bank needed no protection.

205 Q. Please answer my question yes or no.

A. The bank needed no protection, and my father bought those of his own accord.

Q. I will ask you if you didn't testify in the suit in the district court of Iowa for Woodbury county, in the action of the Union Loan & Trust Company against D. H. Talbot and other defendants, and say in answer to the question——

A. Well, I expect I did, and it is all right.

Q. Please let me give my question. That under the national bank act a national bank is not allowed to have more than a claim for ten thousand dollars against one person, and your father was obliged to do that to keep the bank all right?

A. I think I did.

Q. Well, was it true when you made that statement?

A. Was what true?

Q. Was your statement true?

A. Yes, sir; it was all right.

Redirect by Mr. CALL:

The bank received the money for the bonds. It was a sale out and out, without any contingency or condition.

Recross-examination by Judge PHELPS:

Yes, sir, as a matter of fact the Union Loan and Trust Company did have those bonds. They have them as trustees for the holders of the mortgage bonds, whoever they might be.

Redirect examination by Mr. CALL:

I have with me one of the blank bonds issued to the Union Loan and Trust Company by D. H. Talbot. The form is the same as all that were originally issued.

Same is marked Exhibit "D" and offered in evidence.

(Objected to as incompetent, immaterial and irrelevant. Overruled. Plaintiff excepts.)

Witness excused.

In taking the testimony of A. F. Call, to avoid the neces-
206 sity of asking and answering questions, it is agreed that a motion to exclude, after the testimony is given, will be of the same effect as if made when the testimony was given.

A. F. CALL, being duly sworn on behalf of the defendant, testified as follows:

I am a practicing attorney at Sioux City and know the parties to the case, and have been familiar with the most of the dealings between the parties since the early part of the winter of 1890. I was instrumental in assisting Mr. Talbot in issuing these bonds spoken of, and afterwards had charge of the foreclosure of the trust deed and mortgage given to secure them, and conducted the proceedings throughout to the final decree. On the 22d day of April, 1892, my firm, which was then Joy, Hudson, Call & Joy, of which I was a member, commenced an action of foreclosure for the Union Loan & Trust Company, acting for the bondholders, who at that time were T. J. Stone and the First national bank, and against D. H. Talbot and other defendants; and I hold in my hand the original petition filed, which is now a part of the court files of Woodbury county.

(The plaintiff objects to any testimony in support of the answer, or that portion of the answer setting up a former adjudication, and especially upon the ground that said ground of defense in the answer does not state facts sufficient to constitute a defense. Overruled. Plaintiff excepts.)

Mr. CALL: The original petition is marked Exhibit "E" and is offered in evidence.

(Same is objected to upon the ground that it is incompetent and immaterial. Overruled. Plaintiff excepts.)

Mr. CALL: To this petition the defendant, D. H. Talbot, answered by an answer filed in the district court of Woodbury county, on the 30th day of August, 1892, and afterward the defendant, D. H.
207 Talbot, filed an amendment to his answer on the 24th day of October, 1893, and I hold in my hand the original amendment to his answer, filed by Marsh & Henderson, his attorneys, and verified by D. H. Talbot, which I will ask to have marked Exhibit "F," and will offer in evidence.

(The plaintiff objects to the offer made and to each and every part thereof, upon the ground that no sufficient foundation is laid in the answer for their introduction, and that they are incompetent, immaterial and irrelevant. Overruled. Plaintiff excepts.)

Mr. CALL: On the issues presented by this amendment, as well as upon some other issues in the case, the cause was tried before the Hon. F. R. Gaynor, district judge; the defendant in that case being the plaintiff in this, offered evidence as to the amount of interest which he paid to the present defendant on overdrafts, and proved by one Ricketts, an expert witness claiming to have examined the account, that the defendant in that case paid as interest upon overdrafts, during his course of business with the First national bank, the sum of $2,064.

(This testimony with reference to the testimony given in the case mentioned in the evidence is objected to as incompetent, immaterial and irrelevant, and for the further ground that no sufficient foundation is laid in the answer for the introduction of this testimony. Overruled. Plaintiff excepts.)

Mr. CALL (resuming): And on the hearing of the case it was claimed by counsel for Mr. Talbot, this plaintiff, that this amount should be deducted from the amount found to be due on the said bonds; and after hearing the evidence and arguments of counsel, the court adjudged that the said amount of $2,064, together with interest thereon computed at the same rate that interest on the bonds was computed, should be deducted; and the computation of this amount paid as interest upon overdrafts was found to be $545.46, and there-
208 fore the sum of $2,609.49 was deducted from the amount found to be due upon the bonds and judgment and decree rendered for the balance.

(All the testimony following the last objection of the plaintiff, and exception, is objected to and the plaintiff moves to strike it out, first, because it is incompetent, immaterial and irrelevant; second, because that the testimony with reference to the findings and judgment of the court is not the best evidence of what the judgment and findings of the court was. Overruled. Plaintiff excepts.)

Mr. CALL: And I hold in my hands the original decree from which the record was made, and which was approved by the court, which I will ask to have marked Exhibit "G" and offered in evidence.

(This offer of defendant is objected to upon the ground that it is incompetent, immaterial and irrelevant; that it is not the best evidence of what the decree was; is not properly certified and attested as a copy of the decree of the court. Overruled. Plaintiff excepts.)

(Plaintiff now moves to strike out all of the testimony given by the witness A. F. Call as incompetent, immaterial and irrelevant, and upon the further ground that the exhibits offered in connection with his oral testimony are incompetent, immaterial and irrelevant, and asks that the alleged copy of the decree offered be stricken out because no sufficient foundation is laid for its introduction in the answer, and no sufficient foundation is laid for its introduction as an exhibit in evidence, and no sufficient attestation or certification of the said alleged decree to entitle it to admission in evidence. Overruled. Plaintiff excepts.)

Mr. CALL: I hold in my hand the original figuring and statement made by myself and Mr. S. M. Marsh, of counsel for this plaintiff in

the former suit, showing how we arrived at the amount of
209 the decree under the judge's ruling and opinion which he gave on the decision of the case. The figures in ink are my own; the figures in lead pencil were made by Mr. Marsh, showing the amount that should be deducted for overcharge of interest; and the typewritten pages, with the amount due on the bonds, were furnished to me by Mr. Marsh, made in his office; and I ask that the statement, as a memoranda made at the time, may be received in evidence, and ask that it be marked Exhibit "H," and the same is now offered in evidence.

This is objected to as incompetent, immaterial and irrelevant, no sufficient foundation having been laid for its introduction in the answer, or in the testimony preceding its offer, and not the best evidence. Overruled. Plaintiff excepts.

The plaintiff moves to strike out each and every part of the witness' testimony, together with the exhibits offered by him in connection with his oral testimony, upon the grounds heretofore stated, and made a part of the record during the taking of the witness' testimony. Overruled. Plaintiff excepts.

Witness excused.

F. R. GAYNOR, being sworn on behalf of the defendant, testified as follows in chief:

Q. How long have you been district judge in this district?

A. Since the 1st day of January, 189[illegible]

Q. And did you hear and determine the cause of the Union Loan & Trust Company, trustee, *vs.* D. H. Talbot, on the foreclosure of the trust deed securing a part of the bonds upon lands in Woodbury and Plymouth counties?

(Objected to by the plaintiff on the ground that it is immaterial. Overruled. Plaintiff excepts.)

A. I did.

Q. Do you remember whether the case was tried in part upon an issue joined by an amended answer of the defendant, in
210 which he set up a claim based upon interest paid upon overdrafts, which he alleged to be excessive?

(Objected to by plaintiff. Overruled. Plaintiff excepts.)

A. I do.

Q. And upon this particular issue to which I have reference, that in which the defendant in that case asked a deduction for interest paid upon overdrafts of the defendant, will you state what the conclusion and judgment of the court was upon that issue?

(Objected to upon the ground that it is immaterial; second, that it is not the best evidence, the finding and judgment of the court being the best evidence. Overruled. Plaintiff excepts.)

A. My recollection of the conclusion of the court upon that issue is that there was no agreement for the payment of interest beyond

the legal interest, such as could be enforced by law, and that therefore the statute against usury would not apply; but, as a matter of fact, there was included in the things sought to be foreclosed, excessive interest, and my recollection is that this interest was figured on overdrafts, and it was ordered in making the decree that this excessive interest be deducted from the amount for which judgment should be ultimately entered, and I think it was at that time entered only for the amount that was found due after deducting this excessive interest, or this charge of interest upon overdrafts.

(Plaintiff moves to strike the evidence out of the record on the ground that it is incompetent, immaterial and irrelevant, not the best evidence, and the finding and the judgment in the case are the best evidence. Overruled. Plaintiff excepts.)

Cross-examination by Judge PHELPS:

Q. If I understand you rightly, Judge, you found specifically that there was no agreement for a usurious rate?

A. According to my finding, no.

211 Witness excused.

It is agreed between the parties that there was realized from the sale of the property sold under the judgment and decree in the suit of foreclosure wherein the Union Loan & Trust Company brought suit as trustee *vs.* D. H. Talbot, the sum of $87,699.15, $36,439.15 of which was of date March 19th, '94; the sum of $50,060 was of date May 19th, '94, and the sum of $1,200, which was of date July 2d, 1894.

S. M. MARSH, being sworn on behalf of the defendant, testified in chief as follows:

I am an attorney-at-law and have been practicing in Sioux City since 1869. I was attorney for Mr. Talbot in a foreclosure proceeding entitled, I think, The Union Loan & Trust Company *vs.* D. H. Talbot.

Q. Do you recollect in that case of an issue made on an amendment to the answer filed by the defendant, in which he claimed a deduction for an alleged overcharge of interest on overdrafts during his course of business with the bank?

A. The papers themselves are the best evidence to show; there was something of that character; the exact wording I could not state without reference to the papers.

There was a claim of overcharge in Mr. Stone's—the bank's account.

Q. And do you recollect of the case being tried on that issue, in part?

Cross-examination by Judge PHELPS:

I was Mr. Talbot's attorney in the case and conducted his case during the whole of that time and during the pendency of that case the knowledge that I became possessed of as to his claims I became possessed of in my professional character as attorney; some from him and some from other sources. Much of this knowledge that I acquired of his claims was communicated to me in confidential
212 communication between client and attorney, but not all of it. Principally all of the knowledge that I obtained with reference to the case grew out of the fact that I was his attorney, and was obtained while in his employment as attorney and because of my services.

(Plaintiff objects to this testimony upon the ground that it should be excluded, owing to the relation that he bore to the defendant in that case, plaintiff in this, and because the subject-matter inquired of is incompetent, immaterial, and because this testimony is not the best evidence of the facts sought to be obtained. Overruled. Plaintiff excepts.)

A. I do.

Q. Do you recollect the ruling and decision of the court on that issue?

(Objected to as incompetent, immaterial and irrelevant; not the best evidence of what the ruling and decision was. Overruled. Plaintiff excepts.)

A. I do not remember.

Q. Will you state it in a general way?

(Objected to as not the best evidence, incompetent, immaterial and irrelevant; not sufficient foundation laid in the pleadings for the introduction of the testimony. Overruled. Plaintiff excepts.)

A. Upon the issue that Mr. Stone, or the bank, had overcharged in the account, to wit, that on his overdrafts they had figured up interest at ten per cent. I think for thirty days; the court found that there was such overcharge, the exact amount of which was figured up, or at least the figures of the witness Ricketts were taken before the court and upon that the figuring was made of the amount which was over two thousand dollars; without refreshing my memory I could not state the exact amount; such was the finding, or the allowance put in.

(Plaintiff moves to strike this evidence out as incompetent,
213 immaterial, not the best evidence of the facts sought to be shown and not sustained by any averments in the answer of defendant. Overruled. Plaintiff excepts.)

I now show you a paper which we have in evidence, marked Exhibit "H," on which there is some of my writing and figures, and I believe some of yours, in which the amount of that decree was fig-

ured up under the decision announced by the court; will you examine that and see if you recollect the paper?

A. I recognize the paper.

(The witness' testimony with reference to this paper in evidence is objected to upon the ground that it is incompetent, immaterial and irrelevant, and that no sufficient foundation has been laid for the examination of the witness upon this paper-writing, and the paper-writing is not such memoranda as entitles it to either be received in evidence or as a basis upon which to refresh the witness' memory, and for the further reason that the witness at the time this matter is alleged to have transpired was acting in the confidential relationship of attorney for the plaintiff Talbot. Overruled. Plaintiff excepts.)

Q. Now, refreshing yourself from that paper—refreshing your memory from that paper, will you state the exact amount of deduction that was made on account of that interest, and how it was arrived at, and how it came to be made?

(The witness' testimony with reference to this paper in evidence is objected to upon the ground that it is incompetent, immaterial and irrelevant, and that no sufficient foundation has been laid for the examination of the witness upon this paper-writing, and the paper-writing is not such memoranda as entitles it to either be received in evidence or as a basis upon which to refresh the witness' memory, and for the further reason that the witness at the
214 time this matter is alleged to have transpired was acting in the confidential relationship of attorney for the plaintiff Talbot. Overruled. Plaintiff excepts.)

A. It came to be made from the fact that T. J. Stone in his testimony stated these charges, which I have called overcharges, being a part of the claim. It was arrived at by my amending the pleadings on behalf of Mr. Talbot and claiming overcharges, and the testimony of the witness Ricketts taken on that subject, and his testifying the amount he had arrived at. It was figured in the final decree at the amount of $2,609.46, more definitely arrived at by my taking Mr. Ricketts' figures, $2,064 as the amount of overcharges, and interest on that amount computed the same as the interest on the bonds, in the sum of $545.46, making a total which I have mentioned, of $2,609.46.

The way it was put into the decree was, when referred to counsel on both sides by the court. to draw the decree and state therein the amount the decree should be entered, in accordance with this finding. The amount I have mentioned as having been put in, or rather deducted from the total amount, I took from Mr. Ricketts' figures, and it is pencil-marked on Exhibit "H." Whether correct or incorrect, I am not testifying; but that is the amount I ran in as the deduction in the decree.

(The plaintiff moves to strike out the answer of the witness upon the grounds that it is incompetent, immaterial and irrelevant, and

not the best evidence of what the finding, judgment and decree of the court was; and that the knowledge which the witness has of the facts that he testified to were obtained from him by his client while the confidential relationship of attorney and client in that case existed between them. Overruled. Plaintiff excepts.)

Q. The opinion of the court, and the decision of the court preliminary to making the decree was all oral, was it not?

215 & 216 (Objected to as incompetent, immaterial and irrelevant. Overruled. Plaintiff excepts.)

A. His suggestions and directions with regard to making the decree was to the attorneys oral, stating his conclusion, and for them to draw the decree in conformity therewith, so far as I have any knowledge.

Witness excused.
Defendant rests.

* * * * * * *

217 EXHIBIT "B."

D. H. Talbot in account with the First national bank, Sioux City, Iowa.

Year and month.	Total overdraft, aggregate, bank's statement.	Total overdraft, aggregate, actual.	Amount of interest charged by bank.		Being rate per cent. on actual overdraft.	Total overdraft shown by book of bank.
1886.			1886.			
Jan'y.	59,400	59,726.57	Feb. 19	16.50	.1008	59,714.42
Feb'y.	36,800	36,611.74	M'ch 16	10.20	.1020	36,707.94
May		22,318.42				19,938.85
June		52,545.29	July 16	13.00	.0902	54,750.99
July		9,167.36	Aug. 2	2.65	.1055	9,838.30
Aug.		19,462.54	Sep. 16	5.30	.095	19,516.74
Sept.		7,215.27	Oct. 21	1.10	.055	5,987.56
Nov.		30,701.45	Dec. 18	8.15	.1004	31,692.96
			1887.			
Dec.	70,285	70,211.46	Jan. 22	19.52	.1016	70,300.45
1887.						
Jan'y.		118,418.22	Feb. 1	33.00	.1017	118,836 64
Feb'y.		163,110.46	M'ch 2	45.72	.1023	164,659.90
Mar.		216,757.25	Apr. 26	63.55	.1070	228,919.75
Apr.		205,491.18	May 14	57.94	.1022	209,148.66
May.		88,309.64	June 17	25.11	.1037	90,353.58
June		210,326.45	July 28	59.00	.1023	212,416.19
July		310,624.30	Aug. 12	87.05	.1022	313,600.25
Aug.		376,156.95	Sep. 6	106.20	.1030	382,390.45
Sept.		380,929.90	Nov. 17	108.47	.1039	390,342.95
Oct.		147,868.15	Nov. 22	43.89	.1083	158,201.03
			1888.			
Nov.		383,159.57	Jan. —	110.00	.1052	394,981.95
Dec.		598,489.95	Jan. —	170.19	.1038	612,805.41

Exhibit "B"—Continued.

Year and month.	Total overdraft, aggregate, bank's statement.	Total overdraft, aggregate, actual.	Amount of interest charged by bank.		Being rate per cent. on actual overdraft.	Total overdraft shown by book of bank.
1888.						
Jan'y	727,800	706,894.15	May 17	202.16	.1046	730,049.11
Feb'y	811,800	779,508.58	" "	223.50	.1058	811,798.18
Mar.	748,600	729,993.54	" "	207.97	.1042	748,384.94
Apr.	24,900	24,958.49	" "	6 93	.1018	25,252.69
May.	.....	26,198.75	June —	8.50	.1187	30,445.07
July.	3,800	3,551.58	Aug. 11	1.00	.1030	3,793.11
Aug.	19,000	19,600.83	Oct. 19	5.28	.0986	19,078.89
Sept.	104,900	105,084.56	" "	29.11	.1010	104,712.41
Oct.	138,000	144,912.37	Nov. 22	38.33	.0965	141,774.42
Nov.	115,100	114,165 29	Dec. 14	31.97	.1025	115,276.52
			1889.			
Dec.	202,200	199,738.19	M'ch 25	56.17	.1029	202,411.92
1889.						
Jan'y	304,500	301,233.07	" "	84.58	.1021	304,319.26
Feb'y	140,700	137,560.81	" "	39.10	.1038	140,685.62
Mar	126,900	122,791.90	June 19	35.25	.1047	127,315.24
Apr.	125,900	117,232 53	" "	35.	.1120	125,878.68
May.	152,200	145,013.44	" "	42.27	.1063	152,617.66
June	18,400	15,473.38	July 20	5.11	.1205	18,765.62
July.	21,700	21,342.88	Sep. 9	6.00	.1026	21,419.53
Aug.	21,700	21,342.88	" "	6.03	.1031	21,501.29
Sept.	21,000	20,654.40	Nov. 22	6.66	.1176	21,787.92
Oct.	18,100	18,171.11	" "	5.03	.1010	18,709.73
Nov.	9,700	9,410.10	Dec. 11	2.69	.1042	10,029 51
			1890.			
Dec.	10,300	9,723.77	Jan. 2	2.80	.1051	10,673.99
Jan. '90	10,850	9,723.77	Feb. 22	3.00	.1126	10,784.89
Feb.	9,800	8,782.76	M'ch 20	2.72	.1133	9,764.72
Mar.	10,800	9,723.77	Apr. 25	3.00	.1126	10,940.53
				2,079.	Total.	$7,523,277.12

Stone's testimony.

$7,523,277.12 20,611.72 for 1 year.
2,075.00 20,611.72 .10086 per cent. average.

for 1 day.
(The above in pencil.)

	Interest charged.	Total overdraft shown by books of bank.	Rate per cent.	
1886.				
Jan'y...	16.50	59,714.42	.1010	
Feb'y...	10.20	36,707.94	.1014	
May	.....	19,938.85	.....	(May is included.)
June....	13.00	54,750.99	.086	Footing should be 52,479.42, 1 day int.
July....	2.65	9,838.30	.099	538.00 dep. on July 26 and not credited until 27 overdraft ch'g'd. (See pass book.)
Aug.....	5.30	19,516.74	.098	
Sept....	1.10	5,987.56	.066	
Nov....	8.45	31,692.96	.098	
Dec	19.52	70,300.45	.1016	
1887.				
Jan'y....	33.00	118,836.64	.1013	
Feb'y...	45.72	164,559.90	.1013	
Mar. ...	63.55	228,919.75	.1013	
Apr.....	57.94	209,148.66	.1011	
May.....	25.11	90,353.58	.1010	Includes 57.94 for 18 days 1,042.92 1,042.92
June....	59.00	212,416.19	.1016	" int. 57.94 30 days & 25 14 dys. 2,089.74
July....	87.05	313,600.25	.1013	" " 57.94 25 " for 30 days 59.00, 4 days 2,810.55
Aug. ...	106.20	382,390.45	.1013	
Sept....	108.47	390,342.95	.1014	" " 142.05 30 dys. 87.05, 20 dys. 6,002.50
Oct.	43.89	158,201.03	.1012	" " 229.10 30 " 106.00, 22 " 9,209.40
Nov.....	110.	394,981.95	.1017	" " 335.30 31 " 10,394.30
Dec.....	170.19	612,805.41	.1013	" " " " 30 " 108.47, 14 da. 43.89, 9 da. 11,972.59
1888.				
Jan'y...	202.16	730,049.11	.1010	" " 487.66 31 " 15,117 46
Feb'y...	225.50	811,798.18	.1013	" " 487.66 31 " 280.19, 29 da. 23,242.97
Mar.....	207.97	748,384.94	.1014	" " 767.85 29 " 22,267.65
Apr	6.93	25,252.69	.1017	" " 24 " 17,660.55
May	8.50	30,445.07	.1021	And a deposit of 731.85 on Mar. 14 was not credited until Mar. 15.
July....	1.00	3,793.11	.0962	642.56 int. for 5 days.
219-277				
Aug....	5.28	19,078.89	.1010	A deposit on May 4 of 895.85 was not credited until May 5.
Sept...	29.11	104,712.41	.1014	
Oct.....	38.33	141,774.62	.098	Errors in bank's book $1.00 and error in pass book of $175.00.
Nov....	31.97	115,276.52	.1012	
Dec	56.17	202,411.92	.1013	Credit of 1 mo., 5,425.00.
1889.				
Jan'y...	84.58	304,319.26	.1014	
Feb'y...	39.10	140,685.62	.1014	
Mar....	35.25	127,315.24	.1010	
Apr	35.	125,878.68	.1015	
May....	42.27	152,617.66	.1011	
June....	5.11	18,765.62	.099	
July....	6.	21,419.53	.1022	
Aug....	6.03	21,501.29	.1023	
Sept....	6.66	21,787.92	.1115	
Oct.....	5.03	18,709.73	.0981	
Nov....	2.69	10,029.51	.0979	
Dec.....	2.80	10,673.99	.0958	
1890.				
Jan'y...	3.	10,784.89	.1015	
Feb'y..	2.72	9,764.72	.1015	
Mar....	3.	10,940.53	.1000	(The above in pencil.)
		(The above in pencil.)		

* * * * * * *

278 EXHIBIT "D." L. B. G.

No. —. $1,000.

UNITED STATES OF AMERICA, *State of Iowa.*

First-mortgage Seven per Cent. Bond.

I, —— ——, of Woodbury county, State of Iowa, acknowledge myself indebted to the Union Loan and Trust Company, of Sioux City, Iowa, in the sum of one thousand dollars, which sum I hereby promise to pay to the said Union Loan and Trust Company, or bearer, at the office of the said Union Loan and Trust Company, in Sioux City, Iowa, on the first day of January, nineteen hundred, or at the option of the maker at any time after five years from date, with interest at the rate of seven per cent. per annum, payable semi-annually on the first day of July and January in each year, at the office of the said Union Loan and Trust Company, at Sioux City, Iowa.

Both principal and interest to be payable in exchange on New York, and in case of non-payment of any of the installments of interest which shall become due and shall have been demanded for such, and default shall continue for three months after the maturity of such installments, then the principal of the bond shall become due in the manner and with the effect set out in the mortgage herein mentioned.

279 This bond is one of a series of one hundred bonds, of like form, tenor and effect except as to number, numbered from one to one hundred inclusively, amounting in the aggregate to one hundred thousand dollars, all bearing even date herewith. Payment of each and all of which said bonds, jointly, equally and alike with interest as aforesaid is secured by first mortgage bearing even date herewith and executed and delivered by said —— —— to the Union Loan and Trust Company, of Sioux City, Iowa, as trustee, and conveying to said trustee, seven thousand, four hundred thirty-four and four-hundredths acres of land in Woodbury and Plymouth counties, in the State of Iowa, more or less, as more particularly described in said mortgage, with all the buildings, improvements and fixtures thereon, and appurtenances thereunto belonging, and all buildings, improvements and fixtures hereafter placed thereon.

In witness whereof, the said —— —— has hereunto set his hand on the fifteenth day of March, A. D. 1890.

—— ——.

$35.00. $35.00.

I will pay to the bearer hereof at the office of the Union Loan & Trust Company of Sioux City, Ia., on the first day of January, 1900, thirty-five dollars, with exchange on New York, being interest on bond No. — of even date herewith.

Signed at Sioux City, Ia., March 15th, 1890.

(20.) —— ——.

$35.00. $35.00.

I will pay to the bearer hereof at the office of the Union Loan & Trust Company of Sioux City, Ia., on the first day of July, 1899, thirty-five dollars, with exchange on New York, being interest on bond No. — of even date herewith.

Signed at Sioux City, Ia., March 15th, 1890.

(19.) ——— ———.

$35.00. $35.00.

I will pay to the bearer hereof at the office of the Union Loan & Trust Company of Sioux City, Ia., on the first day of January,
280 1899, thirty-five dollars, with exchange on New York, being interest on bond No. — of even date herewith.

Signed at Sioux City, Ia., March 15th, 1890.

(18.) ——— ———.

$35.00. $35.00.

I will pay to the bearer hereof at the office of the Union Loan & Trust Company of Sioux City, Ia., on the first day of July, 1898, thirty-five dollars, with exchange on New York, being interest on bond No. — of even date herewith.

Signed at Sioux City, Ia., March 15th, 1890.

(17.) ——— ———.

$35.00. $35.00.

I will pay to the bearer hereof at the office of the Union Loan & Trust Company of Sioux City, Ia., on the first day of January, 1898, thirty-five dollars, with exchange on New York, being interest on bond No. — of even date herewith.

Signed at Sioux City, Ia., March 15th, 1890.

(16.) ——— ———.

$35.00. $35.00.

I will pay to the bearer hereof at the office of the Union Loan & Trust Company of Sioux City, Ia., on the first day of July, 1897, thirty-five dollars, with exchange on New York, being interest on bond No. — of even date herewith.

Signed at Sioux City, Ia., March 15th, 1890.

(15.) ——— ———.

$35.00. $35.00.

I will pay to the bearer hereof at the office of the Union Loan & Trust Company of Sioux City, Ia., on the first day of January, 1897, thirty-five dollars, with exchange on New York, being interest on bond No. — of even date herewith.

Signed at Sioux City, Ia., March 15th, 1890.

(14.) ——— ———.

$35.00. $35.00.

I will pay to the bearer hereof at the office of the Union Loan & Trust Company of Sioux City, Ia., on the first day of July,
281 1896, thirty-five dollars, with exchange on New York, being interest on bond No. — of even date herewith.
Signed at Sioux City, Ia., March 15th, 1890.
(13.) —— ——.

$35.00. $35.00.

I will pay to the bearer hereof at the office of the Union Loan & Trust Company of Sioux City, Ia., on the first day of January, 1896, thirty-five dollars, with exchange on New York, being interest on bond No — of even date herewith.
Signed at Sioux City, Ia., March 15th, 1890.
(12.) —— ——.

$35.00. $35.00.

I will pay to the bearer hereof at the office of the Union Loan & Trust Company of Sioux City, Ia., on the first day of July, 1895, thirty-five dollars, with exchange on New York, being interest on bond No. — of even date herewith.
Signed at Sioux City, Ia., March 15th, 1890.
(11.) —— ——.

$35.00. $35.00.

I will pay to the bearer hereof at the office of the Union Loan & Trust Company of Sioux City, Ia., on the first day of January, 1895, thirty-five dollars, with exchange on New York, being interest on bond No. — of even date herewith.
Signed at Sioux City, Ia., March 15th, 1890.
(10.) —— ——.

$35.00. $35.00.

I will pay to the bearer hereof at the office of the Union Loan & Trust Company of Sioux City, Ia., on the first day of July, 1894, thirty-five dollars, with exchange on New York, being interest on bond No. — of even date herewith.
Signed at Sioux City, Ia., March 15th, 1890.
(9.) —— ——.

$35.00. $35.00.

I will pay to the bearer hereof at the office of the Union Loan & Trust Company of Sioux City, Ia., on the first day of January, 1894, thirty-five dollars, with exchange on New York, being interest on bond No. — of even date herewith.
282 Signed at Sioux City, Ia., March 15th, 1890.
(8.) —— ——.

$35.00. $35.00.

I will pay to the bearer hereof at the office of the Union Loan & Trust Company of Sioux City, Ia., on the first day of July, 1893, thirty-five dollars, with exchange on New York, being interest on bond No. — of even date herewith.

Signed at Sioux City, Ia., March 15th, 1890.

(7.) —— ——.

$35.00. $35.00.

I will pay to the bearer hereof at the office of the Union Loan & Trust Company of Sioux City, Ia., on the first day of January, 1893, thirty-five dollars, with exchange on New York, being interest on bond No. — of even date herewith.

Signed at Sioux City, Ia., March 15th, 1890.

(6.) —— ——.

$35.00. $35.00.

I will pay to the bearer hereof at the office of the Union Loan & Trust Company of Sioux City, Ia., on the first day of July, 1892, thirty-five dollars, with exchange on New York, being interest on bond No. — of even date herewith.

Signed at Sioux City, Ia., March 15th, 1890.

(5.) —— ——.

$35.00. $35.00.

I will pay to the bearer hereof at the office of the Union Loan & Trust Company of Sioux City, Ia., on the first day of January, 1892, thirty-five dollars, with exchange on New York, being interest on bond No. — of even date herewith.

Signed at Sioux City, Ia., March 15th, 1890.

(4.) —— ——.

$35.00. $35.00.

I will pay to the bearer hereof at the office of the Union Loan & Trust Company of Sioux City, Ia., on the first day of July, 1891, thirty-five dollars, with exchange on New York, being interest on bond No. — of even date herewith.

283 Signed at Sioux City, Ia., March 15th, 1890.

(3.) —— ——.

$35.00. $35.00.

I will pay to the bearer hereof at the office of the Union Loan & Trust Company of Sioux City, Ia., on the first day of January, 1891, thirty-five dollars, with exchange on New York, being interest on bond No. — of even date herewith.

Signed at Sioux City, Ia,. March 15th, 1890.

(2.) —— ——.

$20.50 $20.50

I will pay to the bearer hereof, at the office of the Union Loan & Trust Company of Sioux City, Ia. on the first day of July, 1890, twenty $\frac{50}{100}$ dollars, with exchange on New York, being interest on bond No. — of even date herewith.

Signed at Sioux City, Ia., March 15th, 1890.

(1.) —— ——.

We hereby certify that this bond is one of a series of one hundred of one thousand dollars each, embraced in the mortgage from the said —— ——, conveying the land above mentioned to secure the same, which mortgage we have caused to be recorded in the office of the recorder of deeds of Woodbury and Plymouth counties, in the State of Iowa, where said property is situated.

—— ——.
—— ——.

EXHIBIT "E."

In the District Court of Iowa in and for Woodbury County.

THE UNION LOAN & TRUST COMPANY, Trustee, Plaintiff,
vs.
D. H. TALBOT, PERKINS BROS. COMPANY, DAVIS & Co., Comprised of Z. T. Davis and Chas. Davis, Defendants.

Petition in equity.

Plaintiff, for cause of action, states:

Paragraph 1. That it is a corporation duly organized and
284 existing under the laws of the State of Iowa, and doing business at Sioux City, Iowa.

Par. 2. That on the 15th day of March, A. D. 1890, said defendant, D. H. Talbot made, executed and delivered to plaintiff his one hundred (100) first-mortgage seven per cent. bonds, numbered from one to one hundred, inclusive, due in ten years time, with interest at 7 per cent. per annum, payable semi-annually according to the terms of the twenty (20) interest coupon notes attached to each of said bonds; that said bonds and notes were in words and figures as per copy thereof hereto attached, marked Exhibit "A" and made a part hereof, except that the numbers of said bonds in the upper left-hand corner ran from one to one hundred, inclusive, and such number was filled out in ink in the blank appearing upon each of said coupons.

Par. 3. That to secure the payment of said bonds the defendant D. H. Talbot on the same day made, executed and delivered to the plaintiff his certain trust deed and mortgage, a true, correct and perfect copy of which is hereto attached marked Exhibit "B" and made a part hereof; that by a clerical error in the drafting of said mortgage or deed of trust the following-described land, to wit: The southeast quarter (S. E. ¼) of the southeast quarter (S. E. ¼) of section number two (2), township eighty-nine (89), range forty-eight (48), in Woodbury county, Iowa, was omitted from the description of lands in said

mortgage by the typewriter who prepared the same, but that said mortgage was given to secure and did secure the payment of said bonds upon all of the following-described real estate, to wit:

All that part of section 1 lying south and west of the highway known as Major Change of the Sioux City and Plymouth county road, as established by the board of supervisors of Woodbury county, November 9th, 1885; the east half of the northeast quarter
285 (E. ½ of N. E. ¼), the southeast quarter of the southeast quarter (S. E. ¼ of S. E. ¼) and lot five (5), in section 2; the northwest quarter (N. W. ¼) and the west half (W. ½) of the northeast quarter (N. E. ¼) of section twelve (12); all in township number eighty-nine (89), north of range forty-eight (48), west of the fifth P. M., Iowa; also, the following-described lands in Plymouth county, Iowa:

The northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼) of section number eighteen (18); the south half (S. ½) and northwest quarter (N. W. ¼) of section number thirty-one (31), all in township number ninety-one (91), range number forty-seven (47); the south half (S. ½) and south half (S. ½) of southwest quarter of northeast quarter (N. E. ¼) of section thirty-five (35); the north half (N. ½) of northwest quarter (N. W. ¼); the southwest quarter and northeast quarter (S. W. ¼ and N. E. ¼) of section thirty-six (36), all in township number ninety-one (91), range forty-eight (48); the south half (S. ½) of the northwest quarter (N. W. ¼); the northeast quarter (N. E. ¼) and the south half (S. ½) of section number five (5); the west half (W. ½) of section number seventeen (17); the west half (W. ½) of the northwest quarter (N. W. ¼), northeast quarter (N. E. ¼) of northwest quarter (N. W. ¼), and west half (W. ½) of southwest quarter (S. W. ¼), of section number nineteen (19), all in township number ninety (90), range forty-seven (47); all of section number (1); the north half (N. ½) of northwest quarter (N. W. ¼), north half (N. ½) of northeast quarter (N. E. ¼), southeast quarter (S. E. ¼) of northeast quarter (N. E. ¼), north half (N. ½) of southeast quarter (S. E. ¼), and the southwest quarter (S. W. ¼), of section number two (2); the south half (S. ½) of the northeast quarter (N. E. ¼), and the southeast quarter (S. E. ¼) of section number three (3); the southeast quarter (S. E. ¼) of section number ten (10); the north half (N. ½) of section number eleven (11); the south half (S. ½) of the southeast quarter (S. E. ¼) of section number twelve (12); the
286 north half (N. ½) of the northeast quarter (N. E. ¼), southwest quarter (S. W. ¼) of northeast quarter (N. E. ¼), and the southeast quarter (S. E. ¼), of section number thirteen (13); the south half (S. ½) of the southeast quarter (S. E. ¼) of section number fourteen (14); the northwest quarter (N. W. ¼) of the northeast quarter (N. E. ¼), the northeast quarter (N. E. ¼) of the southeast quarter (S. E. ¼), and the south half (S. ½) of the southeast quarter (S. E. ¼), of section number fifteen (15); the southeast quarter (S. E. ¼) of the northeast quarter (N. E. ¼), and the east half (E. ½) of the southeast quarter (S. E. ¼) of section number twenty-two (22); the south half (S. ½) of the northeast quarter (N. E. ¼), the south half (S. ½) of the southeast quarter (S. E. ¼), the south half of the southwest quarter

(S. ½ of S. W. ¼), and the northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼) of section number twenty-three (23); the northeast quarter (N. E. ¼) and the north half (N. ½) of the southeast quarter (S. E. ¼) of section number twenty-four (24); all of section number twenty-five (25); lots one (1), two (2) and three (3), and the northeast quarter (N. E. ¼) of the southeast quarter (S. E. ¼) of section number thirty-four (34); the east half (E. ½), the southeast quarter (S. E. ¼) of the northwest quarter (N. W. ¼), the northeast quarter (N. E. ¼) of the southwest quarter (S. W. ¼), and the southwest quarter (S. W. ¼) of the southwest quarter (S. W. ¼), of section number thirty-five (35); the southwest quarter (S. W. ¼) of the southwest quarter (S. W. ¼) of section number thirty-six (36), all in township number ninety (90), north of range forty-eight (48), west of the fifth P. M., Iowa, containing seven thousand four hundred thirty-four and $\frac{1}{100}$ acres of land, more or less, and all improvements put thereon. That the said southeast quarter (S. E. ¼) of the southeast quarter (S. E. ¼) of section number 2, township eighty-nine (89), range forty-eight (48), in Woodbury county, Iowa, was included in
the list furnished by the defendant and included in all ab-
287 stracts and other papers preparatory to the execution of said
trust deed and mortgage, and that said trust deed and mortgage was executed with the full understanding on the part of all parties in interest that the said forty acres was included in the land covered by said trust deed, and the trust conveyed by said instrument was accepted and the bonds hereinbefore referred to were certified by the plaintiff as required by the terms of said trust deed with the full understanding that said forty acres *was* so included in the said trust deed.

Par. 4. That on the 17th day of June, 1890, the defendant D. H. Talbot entered into a written agreement with the First National Bank of Sioux City, Iowa, a true, correct and perfect copy of which is hereto attached, marked Exhibit "C" and made a part hereof, and that by the terms of said agreement sixty-one (61) of said bonds were turned over and delivered to the said First National Bank of Sioux City, Iowa, in payment of certain indebtedness of the said defendant, and the same were certified by plaintiff to the said First national bank; and it was further provided in said agreement that the said First national bank should be authorized to pay off any liens or incumbrances upon any of the real estate covered by said trust deed or mortgage, and that as rapidly as it should pay off any such liens and incumbrances bonds to the amounts of such payments should thereupon belong to the said First national bank; and it was further provided that said First national bank should be authorized to sell, as agent for defendant, any of the remaining bonds of said issue of one hundred, and the remainder of the issue were certified by plaintiff to said First national bank to be so sold or to be held by it for the amount so paid as aforesaid in the discharge of liens and incumbrances, at not less than par, and apply the proceeds thereof upon the payment of liens and incumbrances upon the said land;
that the said First national bank has made active and re-
288 peated efforts to sell said bonds at par but has been unable to

sell any of said bonds, but that the said bank has paid off and released liens and incumbrances upon the said land as follows:

On January 30, 1892, it redeemed the south half of the southeast quarter (S. ½ of S. E. ¼) of section fourteen (14), township ninety (90), range forty-eight (48), in Plymouth county, Iowa, for a foreclosure sale in the amount of $572.02. On February 4, 1892, it redeemed and paid off a foreclosure sale amounting to $2,995.45 upon the following-described real estate in Plymouth county, Iowa, to wit, the east half of the northeast quarter (E. ½ of N. E. ¼) of section twenty-four (24), the southeast quarter of the northeast quarter (S. E. ¼ of N. E. ¼) and the north half of the southeast quarter (N. ½ of S. E. ¼) of section two (2), all in township ninety (90), range forty-eight (48), and also the northwest (N. W.) fractional quarter of the southwest quarter (S. W. ¼) of section eighteen (18), township ninety-one (91), range forty-seven (47), and the north half (N. ½) of the northwest quarter (N. W. ¼) and the northeast quarter (N. E. ¼) of section thirty-six (36), township ninety-one (91), range forty-eight (48). That on the 11th day of February, 1892, it paid off and released a mortgage lien amounting to $1,696.40 on the southeast quarter (S. E. ¼) of section (10), township ninety (90), range forty-eight (48), in Plymouth county, Iowa. That on the 11th day of February, 1892, it paid off and released a mortgage lien amounting to $3,257.86 upon the following-described lands situated in Plymouth county, Iowa, to wit, lots 1, two (2) and three (3), and the northeast quarter of the southeast quarter (N. E. ¼ of S. E. ¼) of section thirty-four (34), and the northeast quarter of the southwest quarter (N. E. ¼ of S. W. ¼) of section thirty-five (35), all in township ninety (90), range forty-eight (48). On the 24th day of February, 1892, it paid off a judgment in the district court of Woodbury county, Iowa,
289 against the said D. H. Talbot in the case of C. Hall *vs.* D. H. Talbot, amounting to $5.85. That on the 24th day of February, 1892, it paid off and discharged a judgment in the district court of Woodbury county, Iowa, against the said D. H. Talbot in the case of J. Taylor *vs.* D. H. Talbot, amounting to $6.75. That on the 26th day of February, 1892, it paid off and discharged a judgment against the said D. H. Talbot in the district court of Plymouth county, Iowa, in the case of D. H. Talbot *vs.* Crouch *et al.* in the sum of $10.45. That on March 1st, 1892, it redeemed, paid off and released a foreclosure sale amounting to $682.52 upon the east half of the southeast quarter (E. ½ of S. E. ¼) and the northeast quarter (N. E. ¼) of section twenty-two (22), township ninety (90), range forty-eight (48), Plymouth county, Iowa. And that the said First national bank is entitled to bonds to the amount of said several payments at the date the same were made, and interest as provided in said bonds. That the remainder and residue of said bonds over and above the said sixty-one bonds so delivered to the First national bank as aforesaid, and the amount of bonds required to cover the said several amounts so paid by said First national bank in payment and discharge of liens and incumbrances, all should be surrendered for cancellation.

Par. 5. That under and by virtue of the trust deed hereinbefore

referred to plaintiff is authorized and empowered to keep the buildings upon the premises therein described insured, and to pay any taxes and assessments upon the said premises, and the amount so paid, with 7 per cent. interest per annum, is secured by the provision of the said deed of trust; that, in accordance with such provisions, plaintiff has paid out for taxes and insurance as follows: On September 26, 1890, for taxes of the said premises situated in Woodbury county, the sum of $121.06; on September 30, 1890, for taxes upon said premises situated in Plymouth county, the sum of
290 $243.12; on December 12, 1890, for insurance paid to McNeil & Powell, of Sioux City, Iowa, insurance agents, the sum of $45; on February 4th, 1892, for taxes on the lands hereinbefore set forth redeemed on that day from foreclosure sale by the said First national bank, the sum of $65.00; and that the said Talbot had failed to pay the said insurance and taxes, and that said amounts were paid by plaintiff in the protection of said property and in compliance with the provisions of said trust deed, and that no part of the said amounts so paid by plaintiff for taxes and insurance, and no part of the said amounts so paid by the First national bank in payment of liens and incumbrances, has ever been repaid by said defendant Talbot.

Par. 6. That no part of the interest upon any of said bonds has ever been paid by said defendant Talbot or by any other person, and there is now due upon each of said bonds semi-annual interest payments for July, 1890, January, 1891, July, 1891, and January, 1892, represented by coupons numbered from one (1) to four (4), inclusive, on each of said bonds, together with interest thereon as provided in said bonds and in said deed of trust; that said defendant Talbot has made default in the payment of said interest on each of said bonds, whereby the whole amount of said sixty-one bonds and the amount of bonds required to cover the several amounts so paid by the said First national bank in payment and discharge of liens and incumbrances as aforesaid, together with interest to the present time at seven per cent. per annum, and interest on the coupons so due as aforesaid at six per cent. per annum from the time the same become due to the present time, is now due and payable.

Par. 7. That by the terms of said trust deed it is provided that in case of foreclosure a reasonable attorneys' fee shall be added to the amount recovered, for plaintiff's attorneys herein, and that such reasonable fee in this case would be one thousand dollars ($1,000).

291 Par. 8. That Perkins Bros. Company is a corporation duly organized and existing under and by virtue of the laws of the State of Iowa and doing business at Sioux City, in said State; that the defendants Davis & Company are a copartnership comprising Z. T. Davis and Charles A. Davis and doing business at Sioux City, Iowa; that each of said defendants has, or claims to have, a lien upon the premises above described situated in Woodbury county, but the plaintiff avers that whatever lien said defendants, or either of them may have in or upon said premises is junior and inferior to the lien of plaintiff's said trust deed or mortgage.

Wherefore, plaintiff prays that judgment may be entered herein against the defendant D. H. Talbot for the amount of said sixty-one bonds, with interest thereon as provided in said interest coupons, and for the amounts so paid out for insurance and taxes as aforesaid, with interest at seven per cent. per annum from the date of such payments, and for the several amounts so paid out by said First national bank as aforesaid to pay off and discharge liens and incumbrances upon the said land, with interest at seven per cent. per annum from the date of said several payments, and for costs of this suit, including $1,000 attorneys' fee; that the trust deed or mortgage set forth in Exhibit "B" may be reformed and corrected by supplying the clerical omissions hereinbefore referred to whereby the southeast quarter of the southeast quarter of section two (2), township eighty-nine (89), range forty-eight (48), Woodbury county, Iowa, was omitted from said trust deed or mortgage, and that the same may be included therein, and that said trust deed or mortgage, as so reformed and corrected, may be foreclosed; that special execution issue for the sale of said mortgaged premises, and that the same may be sold, or so much thereof as may be necessary to
292–296 satisfy the said judgment; and for such other and further relief as to justice and equity appertains.

JOY, HUDSON, CALL & JOY,
Attorneys for Plaintiff.

STATE OF IOWA, }
Woodbury County, } *ss:*

A. L. Hudson, being duly sworn, on oath deposes and says that he is one of the attorneys for plaintiff herein and has had personal charge of the interests of plaintiff in the matters set forth in the foregoing petition, and that he has personal knowledge of all matters and things therein set forth; that he dictated and has read the foregoing petition and knows the contents thereof, and that the allegations therein contained are true as he verily believes.

A. L. HUDSON.

Subscribed and sworn to before me by A. L. Hudson this 27th day of April, 1892.

H. T. DONNEL,
[SEAL.] *Notary Public.*

* * * * * * *

297 Know all men by these presents:

That this indenture, made and entered into on this 15th day of March, 1890, by and between D. H. Talbot, unmarried,
298 of Woodbury county, State of Iowa, party of the first part, and the Union Loan & Trust Company of Sioux City, Iowa, a corporation organized under the laws of Iowa, party of the second part, witnesseth:

That whereas, said D. H. Talbot is the owner of the following-described real estate in Woodbury county, Iowa, to wit:

All that part of section one (1) lying south and west of the high-

way known as Major Change of the Sioux City and Plymouth County road, as established by the board of supervisors of Woodbury county, November 9th, 1885; the east half of the northeast quarter, and lot five (5), in section two (2); the northwest quarter and the west half of the northeast quarter of section twelve (12), all in township number eighty-nine (89), north of range forty-eight (48), west of the fifth P. M., Iowa. Also the following-described lands in Plymouth county, Iowa: The northwest quarter of the southwest quarter of section number eighteen (18); the south half and northwest quarter of section number thirty-one (31), all in township number ninety-one (91), range number forty-seven (47); the south half and south half of southwest quarter of northeast quarter of section number thirty-five (35); the north half of northwest quarter, the southwest quarter and northeast quarter of section number thirty-six (36), all in township number ninety-one (91), range forty-eight (48); the south half of the northwest quarter, the northeast quarter, and the south half of section number five (5), the west half of section number seventeen (17), the west half of the northwest quarter, northeast quarter of northeast quarter, and west half of southwest quarter of section number nineteen (19), all in township number ninety (90), range forty-seven (47); all of section one (1), the north half of northwest quarter, north half of northeast quarter, southeast quarter of northeast quarter, north half of southeast quarter, and the southwest quarter of section two (2); the south half of the northeast quarter, and the southeast quarter of section
299 three (3); the southeast quarter of section ten (10); the north half of section eleven (11); the south half of the southeast quarter of section twelve (12); the north half of the northeast quarter, southwest quarter of northeast quarter, and the southeast quarter of section number thirteen (13); the south half of the southeast quarter of section number fourteen (14); the northwest quarter of the northeast quarter, the northeast quarter of the southeast quarter, and the south half of the southeast quarter of section number fifteen (15); the southeast quarter of the northeast quarter, and the east half of the southeast quarter of section twenty-two (22); the south half of the northeast quarter, the south half of the southeast quarter, the south half of the southwest quarter, and the northwest quarter of the southwest quarter of section twenty-three (23); the northeast quarter, and the north half of the southeast quarter of section twenty-four (24); all of section number twenty-five (25); lots one (1), two (2), and three (3), and the northeast quarter of the southeast quarter of section thirty-four (34); the east half, the southeast quarter of the northwest quarter, the northeast quarter of the southwest quarter, and the southwest quarter of the southwest quarter of section thirty-five (35); the southwest quarter of the southwest quarter of section thirty-six (36), all in township number ninety (90), north of range forty-eight (48), west of the fifth P. M. containing seven thousand four hundred thirty-four and four-hundredths acres of land, more or less, and all improvements put thereon.

And whereas, D. H. Talbot is erecting further improvements on said property.

And whereas, the said D. H. Talbot has executed according to law his bonds for one hundred thousand dollars ($100,000) bearing even date herewith, namely, one hundred bonds for one thousand dollars each, numbered from one to one hundred consec-
300 utively, payable to the bearer thereof at the office of the Union Loan & Trust Company, in Sioux City, Iowa, with exchange on New York with interest at seven per cent. per annum payable semi-annually at the same place on the first day of July and January in each year, upon presentation and surrender of the interest coupons thereto annexed as they become due, which said bonds are in form as follows:

No. —. *First-mortgage Seven per Cent. Bond.* $1,000.

I, D. H. Talbot, of Woodbury county, State of Iowa, acknowledge myself indebted to the Union Loan and Trust Company, of Sioux City, Iowa, in the sum of one thousand dollars, which sum I hereby promise to pay to the said Union Loan and Trust Company, or bearer, at the office of the said Union Loan and Trust Company, in Sioux City, Iowa, on the first day of January, nineteen hundred, or at the option of the maker at any time after five years from date, with interest at the rate of seven per cent. per annum, payable semi-annually on the first day of July and January in each year, at the office of the said Union Loan and Trust Company, at Sioux City, Iowa.

Both principal and interest to be payable in exchange on New York, and in case of non-payment of any of the installments of interest which shall become due and shall have been demanded for such, and default shall continue for three months after the maturity of such installments, then the principal of the bond shall become due in the manner and with the effect set out in the mortgage herein mentioned.

This bond is one of a series of one hundred bonds, of like form, tenor and effect except as to number, numbered from one to one hundred inclusively, amounting in the aggregate to one hundred thousand dollars, all bearing even date herewith. Payment of each and all of which said bonds, jointly, equally and alike with interest as aforesaid is secured by first mortgage bearing even date
301 herewith and executed and delivered by said D. H. Talbot to the Union Loan and Trust Company, of Sioux City, Iowa, as trustee, and conveying to said trustee, seven thousand, four hundred thirty-four and four-hundredths acres of land in Woodbury and Plymouth counties, in the State of Iowa, more or less, as more particularly described in said mortgage, with all the buildings, improvements and fixtures thereon, and appurtenances thereunto belonging, and all buildings, improvements and fixtures hereafter placed thereon.

In witness whereof, the said D. H. Talbot has hereunto set his hand on the fifteenth day of March, A. D. 1890.

(With interest coupons attached.)

Now this indenture witnesseth, that I, the said D. H. Talbot, to

secure the payment and interest of each and all of said bonds, jointly, equally and alike, according to the tenor and intention thereof, in consideration of the premises aforesaid and the sum of one dollar to me in hand paid, have granted, bargained, transferred, aliened, assigned and sold, and by these presents do grant, bargain, sell, alien, release and confirm unto said Union Loan & Trust Company, its successors or assigns, all of the lands hereinbefore described, and all buildings, improvements and fixtures thereon, and appurtenances thereunto belonging, and all improvements, buildings and fixtures hereafter placed thereon, the intention being hereby to convey unto the said party of the second part for the purpose herein mentioned all of said real estate, improvements and fixtures now thereon or hereafter to be placed thereon, and said grantor will and does covenant to defend the title thereto against the lawful claims of all persons whomsoever, and that said property is free from all incumbrances, and that said grantor has good right and lawful authority to sell and convey the same, and said property is conveyed to said second party, trustee, in trust for the person
302 or persons or firm or firms, or bodies politic or corporate who shall at any time become and be from time to time the purchasers, holders or owners of the said bonds or coupons, and any or either of them, and for the purpose and on the conditions hereinafter expressed; subject, however, to the possession and management of said property herein conveyed by said first party, as long as no default shall be made in the payment of either principal or interest of the bonds or any of them, and so long as said party of the first part shall well and truly observe, keep and perform all and singular all covenants and conditions in said bond and in this indenture expressed to be observed, kept or performed by or on behalf of said party of the first part. And it is declared that the trust, uses and purposes and conditions by which the rights, premises and property aforesaid are conveyed to and held by the said party of the second part are as follows, that is to say:

Par. 1. The said party of the first part, D. H. Talbot, shall make and execute, and the party of the first part shall certify to the bonds to be secured hereby, an amount which in the aggregate shall not exceed the sum of one hundred thousand dollars, and no greater amount of said bonds shall be issued by the party of the first part, or certified by said trustee under this mortgage or deed of trust.

Par. 2. And until default shall be made in the payment of principal or interest of said bonds or some of them, or until default shall be made in respect to something by these presents required to be done and observed, performed or kept by the party of the first part, then said party of the first part shall be suffered and permitted to operate, manage and enjoy the aforesaid property, and appurtenances thereunto belonging, and use the income, rents and profits thereof in the same manner and with the same effect as though this deed had not been made.

Par. 3. If the party of the first part shall well and truly
303 pay the principal of said bonds, and each and every of them, and all interest thereon when the same shall become due and

payable according to the tenor of said bonds and the coupons issued therewith, and shall well and truly observe, perform and keep all and singular the several things required to be by them performed or kept according to the true tenor, intent and meaning of these presents, then and in that case all the estate, right, title and interest of the party of the second part, its successor or successors in the trust hereby created, shall cease, determine and become void; otherwise the same to remain in full force and effect.

Par. 4. In case default shall be made in the payment of any interest on any of the aforesaid bonds according to the terms thereof or the coupons thereto annexed, or any requirements to be done or kept by the party of the first part, or in case the taxes on said property are not paid, and in case said default shall extend for a period of three months, then the whole of the indebtedness secured by this mortgage, principal and interest, shall become due and payable, and it shall be lawful for the said trustee, the party of the second part, personally or by its attorneys or agents to enter into or upon all and singular the said property hereby conveyed or intended to be conveyed, and each and every part thereof, and to have, hold and use the same and conduct the business thereof, and make such additions, improvements or repairs thereof as may seem to said trustee judicious, and collect and receive all incomes, profits and rents thereof, and of every part thereof, and after deducting the expenses of operating the same and of all said repairs, replacements and improvements, and all payments which may be made for taxes, assessments or charges on said property or any part thereof, to apply the moneys arising aforesaid to the payment of the interest upon said bonds to the persons holding such coupons, and after applying all the
304 interest which shall have become due to apply the balance thus collected to satisfying the said bonds, ratably and without distinction or preference.

Par. 5. In case default shall be made as aforesaid, or in case default shall be made in the payment of the principal or any of said bonds or any part thereof, it shall be lawful for the trustee, the party of the second part, with or without "entry," or by his attorneys or agent, to foreclose the said mortgage, and the equity of redemption of the property shall be conveyed by judicial intervention, or legal proceedings, as by the statutes in such case made and provided.

And on the sale thereof under any such proceedings to apply the proceeds thereof to the payment of said bonds and coupons then outstanding, without discrimination or preference, ratably, after first providing for the payment of all necessary expenses and charges under the execution of said trust.

Par. 6. The party of the first part shall from time to time and at all times hereafter, and as often as requested thereunto by the trustee, party of the second part, deliver and acknowledge all further deeds, conveyances and assurances in law for the better assuring the trustee upon the trust here expressed for said property hereinbefore mentioned or intended to be conveyed, and all interest therein now

held, or that may be required as by the trustee shall be reasonably advised or required.

Par. 7. At any sale of the aforesaid property, or any part thereof, made to enforce the lien created by this trust, the said trustee may bid for and purchase, or cause to be bid for and purchased, the property so sold, in behalf of the holders of the coupons and bonds secured thereby then outstanding, in the proportion of the respective interests of such holders, provided said trustee shall be requested by the holders of said bonds, or a majority of said bonds, so to do, and provided that if all the property so to be conveyed shall be
305 sold as aforesaid the price on which the purchase herein authorized may be made shall not exceed the whole amount of the bonds then outstanding with interest accrued thereon, together with the expenses of this trust and the expenses or said proceedings and sale.

Par. 8. It is hereby declared and agreed that it shall be the duty of the trustee, upon proper indemnification against costs, compensation and expenses, to execute the power of entry hereby granted, and to take the proper proceedings at law or in equity, or both, to enforce the rights of the bondholders under this trust, upon requisition in writing as herein specified, to wit:

(1.) If default be made as to the interest or principal on any of the bonds aforesaid, such requisition upon the trustee shall be by the bondholders of not less than twenty-five per cent. of the said bonds then outstanding, and upon such requisition it shall be the duty of the trustee to enforce the rights of the bondholders by entry or legal proceedings, or both, as the trustee being advised shall deem to be most expedient for the interests of all the holders of said bonds.

(2.) If the default shall be any omission to comply with any other provision herein contained, or to be performed or kept by the party of the first part, then in such case the requisition shall be by the holders of fifty per centum of the bonds outstanding; but it is expressely understood that such duty of the trustee shall be at all times subject to the power hereby declared of the majority in interest of the holders of said bonds by requisition in writing signed by such majority to instruct the trustee to waive such default, or upon adequate indemnity as aforesaid, provided that no action of the trustee or bondholders or both in waiving such default or otherwise, shall extend to or be taken to effect any subsequent default, or to impair the results arising therefrom.

Par. 9. If at any time a vacancy should occur by resigna-
306 tion, death or otherwise of the said trustee, it shall be competent for a majority of said bondholders of said bonds to nominate in writing a trustee to fill such vacancy, and the party so nominated shall be as fully qualified to act as if originally constituted, and if at any time the trustee shall fail to act at the request of a majority of the bondholders as hereinbefore provided, a majority of said bondholders may by notice in writing served upon the said trustee remove said trustee, and at the same time nominating by appointment one or more to fill the place, as they may provide, and said action of removal and appointment shall be summary,

temporary and of immediate effect. But no such action shall be proper except in the case of refusal by trustee to act when and as hereinbefore provided.

Par. 10. It is further agreed that the said trustee shall not be answerable in the discharge of his duties under this trust, except for gross negligence and willful default.

Par. 11. In case of the foreclosure of this mortgage by legal proceedings, or other steps taken to enter upon said premises under the conditions hereof, the said grantor agrees to pay reasonable and sufficient attorneys' fees for legal services incurred or expended by said trustee, and in case of such foreclosure there is to be added as a part of said indebtedness to be made out of said real estate, a reasonable amount for said attorneys' fees, by including in the amount found due in said decree of foreclosure, and the said trustee is also to have and recover such suitable sum as the court may require for his expenses and services in executing said trust.

Par. 12. The said party of the first part agrees to keep said buildings now or hereafter erected on said premises insured in some responsible insurance company, payable in case of loss to the said party of the second part, and to such an amount as the said trustee may require, and in default thereof said party of the second
307 part may effect such insurance, and in case of loss of said premises by fire, said party of the second part may collect from the insurance company insuring the same any money due upon said loss, whether insured as above or in any other manner, to the amount due or that may become due under this mortgage, and this mortgage shall be sufficient authority therefor. And said party of the first part agrees to pay all taxes and assessments that may be levied on said property, and if said assessments or taxes remain delinquent for three months the said second party may pay the same and the amount so paid by said second party for insurance, assessments or taxes, with interest at the rate of seven per cent. per annum, shall be a lien upon said premises as a part of the consideration of this mortgage, and be included in the amount due thereon.

This mortgage is given to secure all and each of said bonds and coupons jointly, without discrimination or preference, ratably and alike.

In witness whereof, said part- of the first part has hereunto set his hand this 15th day of March, A. D. 1890.

D. H. TALBOT.

STATE OF IOWA, }
Woodbury County, } *ss:*

On this 15th day of March, 1890, before me, A. L. Hudson, a notary public within and for said county, personally appeared D. H. Talbot, personally to me known to be the identical person whose name is affixed to the above instrument as grantor, and acknowledged the execution of the same to be his voluntary act and deed for the purposes therein expressed.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day last above written.

A. L. HUDSON,

[SEAL.] *Notary Public in and for Woodbury Co., Ia.*

We hereby accept the trust conveyed upon us in the foregoing mortgage or deed of trust, upon the terms therein set forth.

308 & 309 Witness our hand and official seal on this 12th day of June, A. D. 1890.

THE UNION LOAN & TRUST CO.,

[SEAL.] By E. R. SMITH, *Sec'y & Treas.*

STATE OF IOWA, *Woodbury County,* } *ss:*

Filed for record this 13th day of June, A. D. 1890, at 8 o'clock a. m., and recorded in Book 72, page 461.

C. A. DEMUN, *Recorder.*
G. A. MENSINGER, *Deputy.*

STATE OF IOWA, *Plymouth County,* } *ss:*

Filed for record this 13th day of June, A. D. 1890, at 5.30 o'clock p. m., and recorded in Book 6 of Land Mortgage Records *Records,* at page 607.

WALLACE WINSLOW, *Recorder.*

* * * * * * *

310 EXHIBIT "F." (L. B. G.)

In the District Court of Iowa in and for Woodbury County.

UNION LOAN & TRUST CO., Plaintiff,
vs.
D. H. TALBOT ET AL., Defendants.

Amendment to Answer of Defendant D. H. Talbot.

The defendant, for further amendment to his answer, says:

That about the year 1886 Thomas J. Stone and the First national bank, owners of the claim sued on herein, began loaning money from time to time to this defendant, which dealings continued up to about the year 1890.

That this defendant wholly left the keeping of account of such sums and the legal interest thereon to said Thomas J. Stone and the First national bank.

That whenever it was reported to this defendant by said parties that any amounts were owing on the account, notes or overdrafts, and demand made for a new note or notes, to represent the same, defendant executed and delivered such note or notes therefor.

That such dealings were continued up to about the year 1890 about the time of the execution and delivery of the bonds sued on

herein, held by said parties to represent such accumulated indebtedness, and at which time there was held by said parties against defendant notes amounting to about $61,000.00.

That none of said individual notes were for the principal sum of over $10,000.00, and some less, but signed by various parties as accommodation makers, at the request of said Thomas J. Stone and the First national bank, to enable them to evade the laws of the United States in regard to national banks and banking, but in truth and in fact represented sums owing, or claimed to be owing, from this defendant, and were renewals of prior notes and the claimed interest thereon, renewed and re-renewed many times.

311 That said parties, the said Thomas J. Stone and the First national bank, without the permission, knowledge or consent of the defendant, included with and incorporated into said sums and account claimed to be due and into said notes and given therefor, very large sums of money not owing from this defendant.

That on all amounts and overdrafts said parties charged up interest to defendant, commencing from the beginning of said dealings up to about 1890, at 10 per cent., compounded with monthly rests, every thirty days.

That said illegal charge and charges and compounding of interest and illegal overcharges of such and other kinds amounted to and constituted a very large sum, the exact amount of which defendant cannot state.

That the same and proofs thereof is more particularly within the knowledge and possession of plaintiff and said Thomas J. Stone and the First national bank, the real parties in interest herein.

That said illegal claims and charges were not known by defendant at the time of filing his answer herein nor until during the taking of evidence in this case.

Wherefore, defendant asks that an accounting may be had thereof, and that plaintiff and said parties be required to render an account thereof showing what amount or amounts have been charged for interest from time to time and how computed, and the amount, and that the amount of said overcharges of every kind be allowed defendant and be deducted from any alleged or claimed liability herein.

MARSH & HENDERSON,
Attorneys for Defendant D. H. Talbot.

STATE OF IOWA, }
Woodbury County, } ss:

I, D. H. Talbot, being first duly sworn, on oath state: I am the defendant named in the foregoing-entitled action. That I
312 have heard read the foregoing amendment to my answer herein, and know the contents thereof and the matters and things therein stated are true and correct as I verily believe.

D. H. TALBOT.

Subscribed and sworn to before me and in my presence by the said D. H. Talbot on this 24th day of October, A. D. 1893.

S. M. MARSH,

[SEAL.] *Notary Public in and for Woodbury Co., Ia.*

Endorsed on back as follows:
No. 8550 E. Filed Oct. 24, 1890. R. E. Sackett, clerk.

EXHIBIT "G." (L. B. G.)

In the District Court of Iowa in and for Woodbury County.

UNION LOAN & TRUST COMPANY, Trustee, Plaintiff,
vs.
D. H. TALBOT, PERKINS BROS. COMPANY, and DAVIS & COMPANY, Defendants.

Final Decree.

Be it remembered that on this 23d day of December, A. D. 1893, the above-entitled cause came on for hearing and decree.

The evidence having all been taken in the form of depositions and the cause having been heretofore argued and submitted, the plaintiff appearing by its attorneys, Joy, Call & Joy, and the defendant D. H. Talbot appearing by his attorneys, Marsh & Henderson, and the defendants Perkins Bros. Company and Davis & Company not appearing, the court *has* inspected the service of notice upon said defendants, Perkins Bros. Company and Davis & Company, finds that each of them have been duly served with notice of the pendancy of this suit in due and proper time; therefore, the said defendants and each of them are declared to be in default.

That by virtue and in accordance with the stipulation of the parties hereto duly filed in this cause, the law action in this
313 court No. 8276, wherein The First National Bank is plaintiff and D. H. Talbot is defendant, is consolidated herewith and judgment therein to be included with and a part of the judgment and decree rendered herein.

And the evidence in the case having all been introduced and the cause fully submitted, and the court being fully advised in the premises, it is by the court order-, adjudged, and decreed:

That the prayer of the plaintiff's petition be granted to the extent herein set forth and provided.

That the plaintiff, as trustee for the First National Bank of Sioux City, Iowa, and T. J. Stone, shall have and recover of and from the defendant D. H. Talbot on the matters in controversy, judgment in the sum of ninety-four thousand five hundred and seventy-eight dollars and ninety cents ($94,578.90), and the further sum of nine hundred and seventy-five dollars and seventy-eight cents ($975.78), to be taxed as part of the costs as attorneys' fees for plaintiff's attorneys, and costs of this action taxed at $—, and the further sum of five hundred dollars ($500.00) to be applied on the attorney fees of de-

fendant's attorneys as per stipulation of the parties on file, and taxed as a part of the costs herein.

And is entitled to have its mortgage securing said bonds foreclosed on the following-described lands, to wit:

All that part of section one (1) lying south and west of the highway known as Major Change of the Sioux City and Plymouth County road, as established by the board of supervisors of Woodbury county November 9th, 1885; the east half of the northeast quarter (E. ½ N. E. ¼), the southeast quarter of the southeast quarter (S. E. ¼ S. E. ¼), and lot five (5), in section two (2); the northwest quarter (N. W. ¼) and the west half (W. ½) of northeast quarter (N. E. ¼) of section twelve (12), all in township number eighty-nine (89), north of range forty-eight (48), west of the fifth P. M., Iowa, all in Woodbury
314 county, Iowa. Also the following-described lands in Plymouth county, Iowa: The northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼) of section number eighteen (18), township number ninety-one (91), range number forty-seven (47); the north half (N. ½) of the northwest quarter (N. W. ¼), the southwest quarter (S. W. ¼) and the northeast quarter (N. E. ¼) of section thirty-six (36), all in township number ninety-one (91), range number forty-eight (48); the north half (N. ½) of the northwest quarter (N. W. ¼); north half (N. ½) of the northeast quarter (N. E. ¼), southeast quarter (S. E. ¼) of northeast quarter (N. E. ¼), north half (N. ½) of southeast quarter (S. E. ¼), and the southwest quarter (S. W. ¼) of section number two (2); the southeast quarter (S. E. ¼) of section number ten (10); the north half (N. ½) of section number eleven (11); the south half (S. ½) of the southeast quarter (S. E. ¼) of section number twelve (12); the south half (S. ½) of the southeast quarter (S. E. ¼) of section number fourteen (14); the southeast quarter (S. E. ¼) of the northeast quarter (N. E. ¼), and the east half (E. ½) of the southeast quarter (S. E. ¼) of section number twenty-two (22); the south half (S. ½) of the northeast quarter (N. E. ¼), the south half (S. ½) of the southeast quarter (S. E. ¼), the south half (S. ½) of the southwest quarter (S. W. ¼) and the northwest quarter (N. W. ¼) of the southwest quarter (S. W. ¼) of section number twenty-three (23); the northeast quarter (N. E. ¼) and the north half (N. ½) of the southeast quarter (S. E. ¼) of section number twenty-four (24); all of section number twenty-five (25); lots one (1), two (2) and three (3), and the northeast quarter (N. E. ¼) of the southeast quarter (S. E. ¼) of section number thirty-four (34); the east half (E. ½), the southeast quarter (S. E. ¼) of the northwest quarter (N. W. ¼), the northeast quarter (N. E. ¼) of the southwest quarter (S. W. ¼), and the southwest quarter (S. W. ¼) of the southwest quarter (S. W. ¼), of section number thirty-five (35); the southwest quarter (S. W. ¼) of the southwest quarter (S. W. ¼) of section number thirty-six (36), all in township number
315 ninety (90), north of range forty-eight (48), west of the fifth P. M., Iowa, the said trust deed or mortgage being reformed and corrected so as to include the southeast quarter of the southeast quarter (S. E. ¼ S. E. ¼) of section number two (2), township number eighty-nine (89), range number forty-eight (48), in accordance with the intention of the parties.

The above-described lands being all the remaining lands embraced in said mortgage, upon which said mortgage is a first lien.

And the plaintiff having released the following lands, it is further ordered, adjudged and decreed that said mortgage and the lien thereof be and the same is hereby released as to all the other lands herein described, to wit:

All of section one (1), the south half of the northeast quarter (S. ½ N. E. ¼), and the southeast quarter (S. E. ¼), of section three (3); the north half of northeast quarter (N. ½ N. E. ¼) and the southwest quarter of the northeast quarter (S. W. ¼ N. E. ¼), and the southeast quarter (S. E. ¼) of section thirteen (13); the northwest quarter (N. W. ¼) of the northeast quarter (N. E. ¼), and the northeast quarter of the southeast quarter (N. E. ¼ S. E. ¼), and the south half of the southeast quarter (S. ½ S. E. ¼) of section fifteen (15); the northeast quarter (N. E. ¼) and the south half (S. ½), and the south half of the northwest quarter (S. ½ S. W. ¼), of section five (5); the west half of section seventeen (W. ½ of 17), the northeast quarter of the northwest quarter (N. E. ¼ N. W. ¼), and the west half of the west half (W. ½ W. ½) of section nineteen (19), all in township ninety (90), range forty-seven (47); and the south half (S. ½) and the northwest quarter (N. W. ¼) of section thirty-one (31), township ninety-one (91), range forty-seven (47); and the south half (S. ½) and the south half of the southwest quarter (S. ½ S. W. ¼) of the northeast quarter (N. E. ¼) of section thirty-five (35), township ninety-one (91), range forty-eight (48).

And a special execution shall issue by the clerk of Wood-
316 bury county, Iowa, for the sale of all of said lands yet remaining embraced in said mortgage as aforesaid, with all the improvements thereon and appurtenances thereunto belonging, or so much thereof as may be necessary to satisfy the said judgment aforesaid, with interest, attorneys' fees and costs, and if the said properties do not sell for a sufficient amount to satisfy the said judgment, with interest, attorneys' fees and costs as herebefore provided, then the plaintiff may have a general execution for any deficiency that may remain unpaid after applying the proceeds of said execution sale.

And the equity of redemption of the said defendants, D. H. Talbot, Perkins Bros. Company and Davis & Company, be foreclosed and that the interests of the said defendants and each of them is adjudged to be junior and inferior to plaintiff's claim.

And the said defendants and each of them shall be barred and estopped from ever having or claiming to have any interest in or to the said property superior to the said mortgage of the plaintiff.

That upon rendition of this decree and before the entry of the same or issuing of execution herein, the plaintiff shall surrender to and the clerk of this court shall first cancel the $100,000.00 (one hundred thousand dollars) of bonds covered by said trust deed and all interest coupons attached to or issued with said bonds, and that the same and each thereof be, and hereby are cancelled and discharged.

EXHIBIT "H."

Joy, Call & Joy, attorneys-at-law, Sioux National Bank building, Sioux City, Iowa.

Note dated June 17, '90, at 8 per cent. interest, payable annually, delinquent interest to bear 8 per cent		$3,040.38
Int. for three yrs. six mo		851.30
	Int. on int. due June 17, '91	48.60
317	Int. on int. due June, '92	29.16
	Int. on int. due June '93	9.72
		$3,979.16
Amount paid to redeem S. W. ¼ 2, 90, 48		411.00
(Pencil:) Amount of frs. statement		92,798.20
		$97,188.36
		2,609.56
		$94,578.90
Amount of interest overcharged as figures of Ricketts		$2,064.
Int. on same computed same as on bonds		575.46
		$2,609.46

Plaintiff's attorneys' fees, $975.78.

(Exhibit "H," L. B. G.)

Plaintiff's Evidence in Rebuttal.

D. H. TALBOT, recalled on behalf of the plaintiff, testifies:

Q. State under what circumstances the accommodation notes given by you to the bank and specified in your petition were given by you to the bank.

(Objected to as immaterial and not redirect testimony. Overruled. Defendant excepts.)

A. They were given entirely upon the solicitation of Mr. E. H. Stone and his father, T. J. Stone, president of the bank.

Q. What conversation occurred by and between you and the president and cashier of the bank, at the time or before these notes were given, with reference to your giving them?

A. The first note being an accommodation note given, was dated September 30th, 1887, and was signed by M. P. Scott; it was not signed Mary P. Scott; simply M. P. Scott. Mr. E. H. Stone came to my office at 813 Virginia street and asked me whether or not I could get her, being a clerk in the office, to make this accommodation note; that they had been called upon by the examiner, or in

some manner was called upon by the Government to make
318 some change with reference to the overdraft, that it was too large; and he went into the private room, though the door was open, and spoke to me and explained to me in regard to it; he said there was no harm in it and I at once consented to it and told him that if he would ask Miss Scott to sign it, that I was perfectly willing. He went and asked Miss Scott and she signed it, signing it M. P. Scott, which was for the purpose of evading the examiner.

Q. What conversation, if any, was had between you and the president of the bank, with reference to that note?

(Objected to as the purpose is manifest and does not pertain to the case. Overruled. Defendant excepts.)

A. My recollection is that I had no conversation with the president of the bank with reference to that particular note until March 23rd of the next year, at the time when the overdraft amounted to many thousand dollars and when it was expected that the examiner would be here and they notified me.

Mr. Stone—the two Stones, in fact, notified me. Mr. E. H. Stone and Mr. T. J. Stone met me at the rear office of their bank, the First national bank. They stated that they had to get notes, accommodation notes, from some one for the purpose of passing the examiner; they claiming that the mortgage which I had given them the day before would not permit them to pass the examiner and consequently they had to receive notes. I suggested to them that I did not care about doing so; I didn't want to do it. E. H. Stone, in the presence of his father, after his father, T. J. Stone, had stated that there was no harm in it, that it was all right and was customary to do so, E. H. Stone suggested as an example of the custom, that the Chemical National Bank of New York City, having a capital of only $300,000, did loan as high as $1,000,000 to a single individual, and that for that
319 reason there was no harm in it; and not only that but suggested the names between them, Mr. T. J. Stone doing that more particularly than E. H., as to who I should get, they knowing that these people were my friends and close acquaintances, one of whom was the attorney A. L. Hudson. They asked for the renewal, also, of Miss Scott's note, and I at that time made other arrangements by renewal note with Mr. Day. The arrangement was not made by myself, but it was done by Mr. T. J. Stone himself, who brought the note to me signed by Mr. Day and endorsed I believe by myself. There was a matter also in connection with some scrip which was the same deal with the bank, which was also renewed so as to appear in the form of a note with the avowed purpose of showing that everything was all right so far as the examiner was concerned. Mr. Stone made the remark that he believed in the bank loaning the entire surplus, or some such thing as that; said that he was perfectly willing; that the security which I had and my wealth was sufficient to make it good, and he cared nothing whatever for the accommodation notes except as a matter of form.

There was one by M. P. Scott, the clerk before referred to, of $10,000; one by George P. Day, who was at that time teller in the First national bank, $10,000; one of $8,000, given by A. L. Hudson, my attorney; one of $10,000, given by E. E. Lewis, and I believe also there was one given by T. J. Stone.

Mr. Day, George P. Day, the teller of the First national bank, was also and now is the son-in-law of Mr. T. J. Stone.

Q. What relation, if anything, did Mr. Hudson bear to the bank?

A. I do not know just at that time what relationship he had to the bank, but he is the person who was employed as the chief
320 counsel, as I understand it, according to his evidence and the evidence of Mr. T. J. Stone, to have led me to do certain things in connection with the subsequent transactions, prior to the foreclosure of the mortgage.

On March 23rd, 1888, the bank held a mortgage for $25,000, bearing date of March 8th, 1887, and three mortgages aggregating $36,000, dated March 22nd, 1888. None of these mortgages were delivered up and cancelled at the time of the renewal of any of the notes that I gave to the bank, mentioned in my petition. They all remained subsisting and existing liens against my real estate to secure the indebtedness that I owed to the bank from and after the time of their execution and delivery and during all the transactions between myself and the bank, down to the time of—in June, 1890. The date of the mortgage made to secure the indebtedness at the time that the bonds, the $61,000 in bonds, were made and delivered, was March 15th, 1890. The Union Loan and Trust Company was named trustee in that mortgage for the benefit of T. J. Stone and the First national bank, or the bank proper. That was the mortgage that was foreclosed.

I believe the name of the company who was beneficiary in these first mortgages, that I speak of, before this last one, was the New England Loan and Trust Compeny—the beneficiary was the First national bank and the other company was the trustee. All these mortgages were made to secure my indebtedness, and not otherwise, to the First national bank.

Cross-examination by Mr. CALL:

I endorsed all this accommodation paper.

Q. And turned it into the bank in lieu of your own paper?

A. No, sir.

Q. You turned it in for credit, didn't you?

A. It wasn't recognized as credit.

Q. Well, the giving of these accommodation notes
321 & 322 didn't either increase or lessen your debt to the bank in any way, did it? Simply one form of indebtedness?

A. That was all.

Q. You owed the same sum to the bank that you would otherwise if you had not put them in?

A. Yes, sir.

Redirect examination by Judge PHELPS:

Q. As a matter of fact you endorsed some of the notes and others you did not?

A. Yes, sir.

Testimony closed.

* * * * * * *

323 *Report of Referee.*

To the district court:

This action having been referred to me by the order of said court to find and report the facts and the law in said cause, I report as follows:

That on the 12th day of November, 1895, at 9 o'clock a. m. in my office in Sioux City, Woodbury county, Iowa, after being duly sworn, I proceeded to the trial of the matters referred to me; C. J. Phelps and Lynn & Foley appearing as attorneys for plaintiff, and Joy, Call & Joy appearing as attorneys for the defendant. And after hearing all the evidence offered, and the arguments of counsel, I find the following facts:

First. That the defendant is a national bank organized and doing business under the laws of the United States, and that the plaintiff was a customer and depositor of defendant's from January 1st, 1886, to March 15th, 1890, and during said period overdrew his bank account, and became indebted to the defendant on overdrafts as alleged in the petition.

Second. That monthly during said period, plaintiff's account was balanced, and the interest computed on the overdrafts at the rate of ten per cent. (10 per cent.) per annum, and the interest so charged was added to plaintiff's overdraft account for the next month.

Third. That the defendant instructed its book-keeper to charge plaintiff interest on his overdraft at the rate of ten per cent. (10 per cent.) per annum, and that defendant in computing said interest took the aggregate amount of overdraft, approximating to the nearest hundred, for said month, on a basis of thirty days to the month or three hundred and sixty days to the year, and this way of computing interest on overdrafts was defendant's universal custom and the general custom of bankers in Sioux City during said period.

324 Fourth. That the total interest on plaintiff's overdrafts amounted to two thousand and sixty-four dollars ($2,064.00) and the average rate of interest charged by defendant was ten and $\frac{22}{100}$ per cent. (10.22 per cent.), and the total amount of interest charged in excess of ten per cent. (10 per cent.) was seventy-two dollars ($72.00).

Fifth. There was no contract for plaintiff to pay interest on overdrafts, and the defendant did not intend to charge him more than ten per cent. (10 per cent.) per annum, and that said average rate of ten and $\frac{22}{100}$ (10.22 per cent.) per cent. on overdrafts arose by computing interest on a basis of thirty days to the month, or three hundred and sixty days to the year instead of three hundred and sixty-

five days to the year, and by approximating the aggregate amount of overdrafts for one day to the nearest hundred, in place of computing on the actual aggregate amount, and without any intent to avoid the laws of Iowa relating to usury.

Sixth. That interest on plaintiff's overdraft was included in the several notes, which did not draw excessive interest, given by plaintiff prior to March 15th, 1890, to the defendant, referred to in plaintiff's petition and admitted by the defendant; and all of the indebtedness of plaintiff to defendant, arising or growing out of said bank account from January 1st, 1886, to March 15th, 1890, was evidenced by said notes, but said notes were not given in payment of said indebtedness.

Seventh. That the plaintiff, for the purpose of funding his indebtedness, on March 15th, 1890, executed one hundred (100) of his negotiable bonds, payable to the Union Loan & Trust Company, or bearer, for one thousand dollars ($1,000) each, secured by trust deed to the Union Loan & Trust Company, trustee, on plaintiff's land in Woodbury and Plymouth counties, State of Iowa. On June 17th, 1890, he sold defendant sixty-one (61) of said bonds, amounting
325 to sixty-one thousand dollars ($61,000.00), and gave his note to defendant for three thousand forty dollars and thirty-eight cents ($3,040.38) in full settlement and payment of his indebtedness to this defendant.

Eighth. In March, 1892, the Union Loan & Trust Company, as trustee for the First national bank, this defendant, and T. J. Stone, who is president of defendant's bank, commenced an action against this plaintiff and others to foreclose said trust deed and bonds, and D. H. Talbot, this plaintiff, in his answer and amendments in said case set up that excessive interest had been charged on overdrafts by the First national bank, and said interest had been included in the notes afterwards given, and said notes were merged in the bonds in suit, and asked that an accounting be had of the amount of excessive interest charged on said overdrafts, and that the amount so found be deducted from the amount due on the bonds; and said D. H. Talbot, in support of his allegation, introduced evidence showing the amount of interest charged on said overdrafts; and in the determination of the case the court found that excessive interest on overdrafts to the amount of two thousand and sixty-four dollars ($2,064.00) had been charged the plaintiff, and ordered that said two thousand and sixty four dollars ($2,064.00), with interest at the rate named in the bonds, amounting to five hundred ninety-five dollars and forty-six cents ($595.46), making a total of two thousand six hundred nine dollars and forty-six cents ($2,609.46), be deducted from the amount due on the bonds, and a decree was entered in said case for the amount due on said bonds, less said sum of two thousand six hundred nine dollars and forty-six cents ($2,609.46).

Ninth. That in said cause a decree for ninety-four thousand five hundred seventy-eight dollars and ninety cents ($94,578.90) was rendered, of which forty-nine thousand seventy dollars and
326 forty-seven cents ($49,070.47) was principal, thirty thousand nine hundred eighty-eight dollars and fifty-two cents

($30,988.52) was interest and fourteen thousand five hundred nineteen dollars and ninety-one cents (14,519.91) was the amount paid on prior liens, taxes and interest on same by plaintiff in that action.

Tenth. That the sheriff, under an execution issued on said decree, sold March 19th, 1894, plaintiff's property, amounting to thirty-six thousand four hundred thirty-nine dollars and fifteen cents ($36,439.15); and on May 19th, 1894, under said execution sold property amounting to fifty thousand and sixty dollars ($50,060), and on July 2d, 1894, sold under said execution property amounting to twelve hundred dollars ($1,200.00), making a total of eighty-seven thousand six hundred ninety-nine dollars and fifteen cents ($87,699.15) realized from sheriff's sale of said land under said decree, and leaving a balance, including the interest to date of sale, of eleven thousand one hundred forty-one dollars and five cents ($11,141.05) unpaid on said judgment and decree, which balance, with interest, has not been paid.

Eleventh. That the intere-t on overdrafts, not having been included in said decree, was not paid by the sale of plaintiff's land under said execution.

Twelfth. That plaintiff's overdrafts, including interest thereon, was paid June 17th, 1890, more than four (4) years before the commencement of this action.

I find as conclusions of law:

First. That interest on overdraft was excessive, but not illegal, or usurious, and did not taint the subsequent debt, notes and bonds, of which it formed a part of the consideration.

Second. That the custom of bankers to compute interest on a commercial basis of thirty days to the month, making three hundred and sixty days to the year, under the tables, is legal.

Third. That plaintiff's cause of action occurred June
327 & 328 17th, and this suit is barred under section 5198 of the Revised Statutes of the United States, on which this action is based.

Fourth. That the matter in this suit was adjudicated between the same parties in the case of the Union Loan & Trust Company *vs.* D. H. Talbot, and that relief could have been granted, and plaintiff is now estopped from maintaining this suit.

Fifth. That interest charged plaintiff on overdraft was not included in and did not form a part of the decree in the case of the Union Loan & Trust Company *vs.* D. H. Talbot, and was not paid by said sheriff's sale of plaintiff's property under execution issued on that decree.

I recommend that judgment be entered dismissing plaintiff's petition, and that defendant have judgment for costs.

Respectfully submitted.

W. G. SEARS, *Referee.*

* * * * * * *

329 In the District Court of Iowa in and for Woodbury County.

DANIEL H. TALBOT, Plaintiff,
vs.
THE FIRST NATIONAL BANK OF SIOUX CITY, IOWA, Defendant.

Plaintiff's Exceptions to the Report of the Referee.

And now comes the plaintiff and excepts to the findings of the referee, as follows:

I.

To so much of the second finding of facts as limit the rate charged to ten per cent. per annum, as against the clear weight of the evidence.

II.

To so much of the third finding of facts as relates to the custom of defendant bank and the general custom of bankers in Sioux City, — wholly immaterial.

III.

To the fourth finding of facts as against the clear weight of evidence.

330 IV.

To so much of the fifth finding of facts as refers to the defendant's intention as against the clear weight of testimony and immaterial.

V.

To so much of the seventh finding of facts as finds that plaintiff sold to the defendant $61,000 of bonds and his certain note for $3,040.38, in full settlement and payment of his indebtedness to the defendant, as against the clear weight of the evidence.

VI.

To the eighth finding of facts as against the evidence in the case and unsupported by any pleading or issue tendered in the suit therein mentioned or in the finding, judgment and decree in said suit, or under the issues tendered in this action.

VII.

To the eleventh finding of facts as against the clear weight of the evidence.

VIII.

To the twelfth finding of facts because it is against the clear weight of the evidence.

IX.

And the plaintiff further excepts to the first conclusion of law contained in said referee's report, upon the ground that the same is unsupported by the evidence and contrary to law.

X.

To the second conclusion of law in said referee's report upon the ground that the same is unsupported by the evidence and contrary to law.

XI.

To the third conclusion of law in said referee's report upon the ground that the same is unsupported by the evidence and contrary to law.

XII.

To the fourth conclusion of law in said referee's report,
331 upon the ground that the same is unsupported by the evidence and contrary to law.

XIII.

To the fifth conclusion of law in said referee's report upon the ground that the same is unsupported by the evidence and contrary to law.

C. J. PHELPS AND
LYNN & FOLEY,
Attorneys for the Plaintiff.

March 19, 1896, 4th day, March term, 1896.

D. H. TALBOT, Plaintiff,
vs.
FIRST NATIONAL BANK OF SIOUX CITY, IOWA, Defendant. } No. 13277. Law.

And now, to wit, March 19, 1896, this cause comes on for hearing and ruling upon the report of the referee heretofore appointed herein, W. G. Sears, Esq.; said report having been filed December 20th, 1895; Lynn & Foley appear for the plaintiff and the defendant appearing by its attorneys, Joy, Call & Joy.

And the court having carefully inspected the pleadings herein and the report of referee now on file, having heard counsel herein and being fully advised in the premises, finds that the conclusions contained in the report of referee are correct; that the matters in this suit were adjudicated between the parties in the former action; that plaintiff's cause of action occurred June 17th, 1890, and his suit is barred by United States statutes, on which this action is based, and that plaintiff's petition should be dismissed at his costs.

It is therefore ordered and adjudged by the court that the report of referee W. G. Sears, Esq., now on file in this cause, be, and the same is hereby approved and confirmed.

It is further ordered and adjudged that plaintiff's petition in this cause be and the same is hereby dismissed, and that the
332–340 defendant, First National Bank of Sioux City, have and recover from the plaintiff, D. H. Talbot, the costs of this action at $—, which costs shall include one-half the fees of referee, which are allowed in the sum of $100, as his full compensation for services herein, and the balance of such referee's fees, $50, shall be paid by the defendant.

And to the finding of referee and approval of the same, and the finding and judgment of the court, the plaintiff at this time duly excepts, and is given ninety days from this date in which to file his bill of exceptions, and to order of the court as to payment of the fees of the referee both the parties except.

* * * * * * *

341 In the Supreme Court of the State of Iowa, October Term, 1896.

DANIEL H. TALBOT, Appellant,
vs.
FIRST NATIONAL BANK OF SIOUX CITY, IOWA, Appellee. } Law. No. 13277.

Appeal from Woodbury district court.

Before Hon. Scott M. Ladd, trial judge.

Lynn & Foley, C. J. Phelps and M. C. Beck, heretofore attorneys for appellant (but who, instead, is now represented solely by himself).

Joy, Call and Joy, attorneys for appellee.

Appellant's Amended and Additional Abstract.

Now comes the plaintiff and appellant in the above-entitled cause, and with the consent of the supreme court, submits the following corrections of his abstract heretofore filed with the clerk of the supreme court of Iowa on or about March 30, 1897, as
342 his amended abstract thereto. The "pages" and "lines" from the "top" or "bottom" as hereinafter referred to will have special reference to such numbered pages, or counted lines, in the abstract heretofore filed.

On page 1, in line 7 from bottom, the following, "office of the clerk of the" should be inserted between the words "defendant in the" and "district court of Woodbury county," so that the line to the end of the sentence shall read, "against the defendant in the office of the clerk of the district court of Woodbury county, Iowa, in words and figures following, to wit:" showing that after the word Iowa "as follows" is supplanted by the several words last above written.

On page 2, in tenth line from bottom, after the amount "$2,079" the words "of which" should be inserted.

On page 3, in lines 13 and 16 from top of page respectively the figures representing the respective amounts "$9,440.74" should be made to read "$94,040.74" respectively.

On page 6, following the petition and just before Exhibit "A," should be inserted, "Lynn, Sullivan & Foley, attorneys for plaintiff."

On page 7, the sentence beginning in 7th line from bottom, which now reads: "And on the 25th day of March, 1895, the defendant filed its answer to said petition as follows:" should be so changed as to read: "And on the 25th day of March, 1895, the defendant filed its answer in the office of the clerk of the district court of Woodbury county, Iowa, to said petition, in words and figures following, to wit:"

On page 8, in line 10 from bottom, after the words "The Union Loan and Trust Company," should be inserted "trustee," so as to read "The Union Loan and Trust Company, trustee."

On page 9, at the close of the "answer" to the petition preceding, insert "Joy, Call & Joy, attorneys for defendants." On same page 9, lines 9 and 10 from bottom, forming following sentence,
343 "Thereafter, on the 18th day of September, 1895, plaintiff filed his amended and substituted petition as follows," should be added to in lieu of the words "as follows" the following: "in the office of the clerk of the district court of Woodbury county, Iowa, in words and figures following, to wit:"

On page 13, in 4th and 5th lines from the bottom, the amount "$51,410" should read instead thereof "$15,410."

On page 33, in 6th line from the top, the amount "$16,151.98" should be instead thereof "$6,151.98."

On page 56, in second line from bottom, the amount "$23,012.87" should read instead thereof "$23,112.87."

On page 59, in 6th line from top, the amount "$20,938.13" should be made to read "$26,938.13."

On page 64, in 3d line from top, the amount "$105.03" should be instead thereof "$145.03."

On page 82, in 18th line from top, the amount "$136.18" should be made to read "$186.18."

On page 84, in line 16 from top, the amount "$2,337.03" should read "$2.387.03."

Following the close of the amended and substituted petition, on page 104, should be added thereto as follows: "Lynn, Sullivan & Foley and C. J. Phelps, attorneys for plaintiff." On same page, in line 10 from top, after the word "filed" should be inserted, "its answer in the office of the clerk of the district court of Woodbury county, Iowa, in words and figures following," thereby causing the entire sentence to read as follows: "To which the defendant, on the 9th day of November, 1895, filed its answer in the office of the clerk of the district court in and for Woodbury county, Iowa, in words and figures following, to wit:"

On page 108, following "and for judgment for costs" as the 29th line, and before "Exhibit 1," insert the following: "Joy, Call &

Joy, attorneys for defendants." And following the above
344 (copy of verification is hereto printed in full, and ask that it with the remainder of this amended abstract, be made a part of the original abstract:)

STATE OF IOWA, } ss:
Woodbury County, }

I, Edgar H. Stone, being first duly sworn, on oath depose and say that I am the cashier of The First National Bank, the defendant in the above-entitled suit, and as such cashier have full knowledge of all matters and things set forth in the above and foregoing answer, which said answer I have read and the contents of which I know, and that the statements and allegations therein contained are true, as I verily believe.

EDGAR H. STONE.

Subscribed in my presence and sworn to before me by the said Edgar H. Stone, this 9th day of November, A. D. 1895.

[SEAL.] C. L. JOY,
Notary Public in and for Woodbury County, Iowa.

On page 109, which is shown to be a continuation of Exhibit 1, referred to and made a part of defendant's answer to plaintiff's amended and substituted petition just preceding and sworn to as above by Edgar H. Stone, as cashier, should be corrected as follows: In line 20, where the amount is shown to be "$5,865.30," it should be and be made to read "$5,865.88," and in the 8th and 9th lines from bottom of this same page 109, the statement "adding interest to March 15, 1890, on above at 10 per cent.—$4,043.88" is absolutely false, in so far as the "rate" of interest alone, should have been expressed, and will be hereinafter referred to and shown in the abstract and this amended abstract as at the rate of "8 per cent" and not 10 per cent., as herein set out in defendant's answer.

On page 110, the sentence beginning in the 15th line from the bottom, and which after the word "reply," in lieu of the words "as follows," there should be added the words, which would then cause the entire sentence to read: "And on the 12th day of No-
345 vember, 1895, plaintiff filed his reply to defendant's answer in the office of the clerk of the district court in and for Woodbury county, Iowa, in words and figures following, to wit:"

And also on page 110, in the 5th line from the bottom, which reads as follows, "by the court, whereupon the following proceedings were had," should instead thereof be made to read "by the district court in and for Woodbury county, Iowa, upon the 4th day of November, A. D. 1895, and which proceedings of said court were duly made a part of the records of said court by recording the same upon page 214, in vol. 28 of the district court record of Woodbury county, Iowa, whereupon the following proceedings were had"—

On page 111, following the two first lines at the top of the page insert the following: "And now, at the hour of 2 p. m. of the 12th

day of November, A. D. 1895, pursuant to adjournment from the hour of 9 a. m. this day, C. J. Phelps and Lynn & Foley by T. L. Foley, appearing as counsel for plaintiff, and Joy, Call & Joy by A. F. Call, appearing as counsel for defendants, and L. B. Green having been selected by both parties as shorthand reporter to take and transcribe the evidence, the following evidence was introduced on behalf of the plaintiff."

On page 112, at the end of the 4th line from the bottom, add the following, "whatever date that was," thereby causing it to read after last comma, "about the time they were made up, whatever date that was."

On page 115, following the word "contains," in the 7th line from the top, there should have been inserted in the abstract the words, "objection sustained," which is now asked to be so included and made a part thereof.

On page 119, after the words "witness excused" in the 7th line from the bottom, and just before the name J. B. Keefe, the
346 following words should be inserted: "Following the giving of the above testimony, upon the same day and in the same cause."

On page 121, in 8th line from the top, the figures "1883" should read "1886."

On page 124, in 5th line from the bottom, the amount $727.80 should read $727,800.

On page 133, after the closing of the 5th line from the bottom, there should be inserted, "Adjourned until 9 a. m., Nov. 13, 1895," and still following this, "At which time, 9 a. m. November 13, 1895, in pursuance to adjournment, and the taking of testimony on behalf of the plaintiff being resumed, J. B. Keefe, being recalled"—

And upon a slip sheet, bound between pages 134 and 135, and intended as the introduction of the exhibits therein and hereinafter mentioned, and which follow in the abstract after the words, "Plaintiff rests," Exhibits "1," "2," "3" and "4," introduced in evidence on behalf of the plaintiff and referred to in plaintiff's testimony, are as follows: (See, also, Exhibit "B" in defendant's testimony.)

On page 195, there should be inserted at top of the page the following, "And in pursuance of adjournment heretofore mentioned, the above-entitled cause came on for hearing before W. G. Sears, referee, at 9 o'clock a. m., November 13, 1895, the heretofore-named counsel for the respective parties still remaining."

On page 200, in 7th line from top, instead of "paid the bonds" it should read "bought the bonds."

On page 201, in 8th line from top, the amount "$1,928.37" should read "$1,926.37."

On page 207, in 14th line from top, after the words "the plaintiff in this" there should be added the word "case" before the word "offered."

On page 209, after the words "witness excused" in the 15th
347 line from bottom, there should be inserted in a new sentence the following: "And now, at the hour of 1.30 p. m., pursuant

to adjournment, the taking of testimony in the above-entitled cause being resumed, F. R. Gaynor being sworn * * *."

On page 216, between 4th and 5th lines from the top, there should be inserted as follows: "D. H. Talbot, note dated May 28, 1889, $5,865.88." And in 7th line from top of same page, it should read "M. P. Scott, dated April 27, 1889," instead of as shown in the abstract, "M. P. Scott, dated April 27, 1890."

And on same page 216, in 10th and 11th lines taken as one sentence in Exhibit "A" of defendant, should read as follows: "Adding interest to March 15, 1890, on above at .08 per cent., $4,043.88," instead, as by typographical error therein, in showing the said sentence to read, "Adding interest to March 15, 1890, on above at .10 per cent., $4,043.88."

On page 217, in Exhibit "B"—an agreed exhibit of parties in suit—the 7th or last column of figures under the heading: "Total overdraft, shown by books of bank" and the same as contained on page 218, to the first printed cross line or ruling across said page—represent- that portion which defendant supplied as per evidence shown; the other, or six first columns, represent the computations of the plaintiff. And upon this same section of this exhibit, the two lines of figures just above the above-mentioned cross-line, under the words "Stone's testimony," should be corrected as follows: After the figures, "7,523,277.12," and preceding "20,611.72" insert the figures "÷ 365 =" ; and in the second line the amount "$2,075.00" should be made to read "$2,079.00."

And on the latter page, 218, below the cross-line, the computations there shown in the column headed "Total overdraft—shown by books of bank," and continued on page 219 to Exhibit "C," represents the figures in the 7th column above referred to as supplied by the defendant. The remainder of the figures shown from the above cross-line and continued to Exhibit "C"—and also the two lines of figures above referred to directly below "Stone's testimony" and above the cross-line, are made by the plaintiff in a general recapitulation by computation upon the figures and amounts given by the defendant in evidence; and a further itemized line of errors from the same deduction in the defendant's representations is shown on the right side or section of the same pages by the plaintiff. And in 4th line of this section from the bottom, on page 218, under the figures "767.85," there should be quotation marks under the figures "767."

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On page 266, in 15th line from top, where the abstract shows "*8,795.71" it should read "*7,895.71."

On page 273, in line 24 from bottom, right division of page, in third column, the amount of deposit of "586.88" should read "5,865.88."

On page 278, upon the bond therein copied, the figures and dollar mark representing the face amount of the bond should have been given to represent across the face of the bond "$1,000." And also, on page 283, should have been and is asked now to be inserted the following, which is an exact copy of that which is printed upon the back of the bond:

"No. —. First-mortgage seven per cent. bond. $1,000. Interest payable semi-annually in July and January, at the office of the Union Loan and Trust Company, Sioux City, Iowa."

And following the above, and as introductory to the identification of the papers offered by the defendant as Exhibit "E," is as follows, and asked to be made a part of the original abstract in the above cause: "And that heretofore, to wit, on the 28th day of April, 1892, a petition was filed in the office of the clerk of the district court in and for Woodbury county, Iowa, in words and figures following, and was offered in evidence by the defendant as Exhibit "E."

349 On page 292, after the words "(seal)" and "notary public" in the 15th line from top, there should have been inserted the title, "Exhibit A," meaning the "Exhibit A" referred to in the petition in equity for foreclosure filed with the clerk of the district court of Woodbury county as aforesaid April 28th, 1892, and of which "Exhibit E" above referred to this "Exhibit A" is made a part.

On page 297, following the certificate to the bond by the Union Loan and Trust Company, to identify more particularly, add: "The following mortgage was included in the petition offered by defendant as Exhibit 'E,' filed in the office of the clerk of the district court in and for Woodbury county, the 28th day of April, 1892, and in that petition referred to as Exhibit 'B' and made a part thereof."

On page 308, after the signature, "Wallace Winslow, recorder," in 12th and 13th lines from top of page, and before the words "This agreement," should be inserted so much of "the petition in equity" herein offered as "Exhibit E" as shall show this: "A true, correct and perfect copy of which is hereto attached, marked Exhibit 'C' and made a part thereof" (see 3rd, 4th and 5th lines of par. 4, page 287, of the abstract).

(And further, your attention is called to the fact, that but 8 per cent. is the rate shown in this so-called agreement, and therein offered by the defendant as a part of Exhibit "E," and not 10 per cent. as heretofore sworn to by the cashier of the defendant, and made a part of its answer to the amended and substituted petition in the case at bar.)

On page 310, at top of the page preceding Exhibit "F," should be inserted and made to read as follows: "The offering by defendant as marked Exhibit 'F' represented to be an amendment to answer of defendant in the case of The Union Loan and Trust Company, plaintiff, *vs.* D. H. Talbot *et al.*, defendants, was

350 filed, provided this uncertified exhibit is a copy of the original, in the office of the clerk of the district court of Woodbury county, Iowa, the 24th day of October, 1893."

On page 312, in the 9th line from top, "1890" should read "1893." On same page insert just preceding the words "Exhibit G," "That, as shown by the records of the district court of Woodbury county, a final decree in case, No. 8550, of Union Loan and Trust Company, trustee, *vs.* D. H. Talbot, Perkins Bros. Co. and Davis & Co., defendants, was filed for record the 18th day of January, 1894" (but

the said record shows an interlin-ation above a caret, "with interest at 7 per cent. per annum," which words so interlined are not supported by caret or otherwise in the "original decree" offered by defendant as Exhibit "G"—see testimony of Mr. Call, p. 208 of abstract.) And, also, on same page 312, in the second line below the words "final decree," being the 16th from the bottom of the page, after the word "for" and just before the word "hearing," the word "final" should be inserted, thus making the sentence after and including the word "for," "for final hearing and decree."

On page 317, just preceding plaintiff's evidence in rebuttal, insert the following: "Being a continuation of the plaintiff's evidence in above-entitled cause."

On page 322, after the signature, "W. G. Sears, referee," in the 5th line from bottom, insert the following: "And in compliance with the instructions of the district court of Woodbury county, Iowa, and by virtue of the appointment of W. G. Sears as referee, the 4th day of November, A. D. 1895, said referee Sears made the following report to the said court, and attached thereto all other evidences, whatsoever, submitted to him in this cause, which he filed as a whole with the clerk of the district court of Woodbury county, Iowa, on the 20th day of December, A. D. 1895."

On page 327, after the signature, "W. G. Sears, referee,"
351–365 in the 16th line from the top of the page, insert the following: "Motion to set aside referee's report was filed in the office of the clerk of the district court of Woodbury county, Iowa, the 6th day of January, A. D. 1896."

On page 329, after the words "attorneys for plaintiff," in the 9th line from bottom of page, insert following as a new line: "Plaintiff's exceptions to the report of the referee, filed in the office of the clerk of the district court of Woodbury county, Iowa, the 6th day of January, A. D. 1896."

On page 331, following in new line "attorneys for plaintiff" in 9th line from top of page, the following: "The copy of the decree of the district court of Woodbury county, Iowa, approving the report of Referee W. G. Sears in the above-entitled cause, here following, is found to have been made a part of the district court record of Woodbury county, Iowa, on page 214, vol. 28, of said record."

D. H. TALBOT,
For Himself.

366 Said cause was on the 17th day of May, 1898, submitted to said supreme court on the foregoing record, and, having been fully considered, the court filed its decision (opinion) in writing on the 15th day of October, 1898, and on the same day rendered a final judgment in said cause, said decision and record of final judgment being in the words and figures following, to wit:

Filed Oct. 15, 1898.

In the Supreme Court of Iowa.

DANIEL H. TALBOT, Appellant,
vs.
FIRST NATIONAL BANK OF SIOUX CITY, IOWA.

From Woodbury district court, Scott M. Ladd, judge.

Plaintiff brings this action, under sec. 5198 of the Revised Statutes of the United States, to recover $47,020.37, illegal interest alleged to have been knowingly charged to him by the defendant and to have been paid by him to the defendant without knowledge of such illegal charges. He also asks to recover the penalty provided in said section, demanding in all the sum of $94,040.74.

The defendant answered denying that it had charged or that the plaintiff paid any illegal interest to the defendant, and alleging a former adjudication, and that this action is barred by the statute under which it is brought.

The case was referred to L. B. Green, Esq., who, after a full hearing, reported his findings of facts and conclusions of law. To these the plaintiff filed exceptions, and upon a hearing on the exceptions the report of the referee was approved and judgment rendered dismissing plaintiff's petition and for costs, from which judgment plaintiff appeals.

367 D. H. Talbot, for appellant; Wright, Call & Hubbard, for appellee.

GIVEN, *J.:*

I. Plaintiff presents this case in 350 pages of abstract and an opening argument of 125 pages; to which argument the defendant has responded in 12 pages. Plaintiff's substituted petition as abstracted covers 194 pages, and the entire pleading 110 pages. We will not set out the details of this elaborate record, but proceed to consider questions raised by the exceptions to the report, namely, whether illegal interest was charged, and, if charged, whether it was paid, and the defenses of former adjudication and barr of the statute.

II. Sec. 5197 of the Revised Statutes of the United States authorizes national banks to charge "interest at the rate allowed by the laws of the State, Territory or district where the bank is located."

Sec. 5198 of said statute provides as follows:

"SEC. 5198. The taking, receiving, or charging a rate of interest greater than is allowed by the preceeding section, when knowingly done, shall be deemed a forfeiture of the entire interest, which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from

the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

The evidence shows and the referee found that monthly during the period of these transactions plaintiff's account was balanced and the interest computed on the overdraft at the rate of 10 per cent. per annum, and the interest so charged added to the ac-
368 count; also that in computing said interest the defendant took the aggregate amount of overdraft approximating to the nearest hundred for the month on the basis of 30 days to the month, or 360 days to the year.

Under the laws of Iowa the plaintiff was only entitled, in the absence of contract, to charge interest at the rate of 6 per cent. per annum, and there is no evidence that these charges were made in pursuance of any contract. Defendant's counsel make some claim that the written contract of June 17, 1890, warranted this charge of interest, but we do not think so, nor do we think that the charge can be legalized by a custom of the banks as to the manner of computing interest where the custom results in giving a higher rate of interest than is authorized by law. The interest thus computed on the overdrafts was included in the notes given by the plaintiff from time to time, but the notes themselves did not otherwise draw illegal interest.

The referee correctly finds that the total interest on plaintiff's overdrafts amounts to $2,064.00, that the average rate of interest charged was 10.22 per cent., and that the total amount of interest charged in excess of 10 per cent. was $72.00.

We think it entirely clear under the evidence that all interest charged on overdrafts in excess of 6 per cent. was a greater rate of interest than was allowed by the laws of this State.

III. It will be observed that this is not an action to forfeit the entire interest under the first provision of said sec. 5198, but an action to recover back said interest as having been paid.

In determining whether said interest has been paid and whether this matter has been formerly adjudicated the following facts appearing in the evidence must be considered: On the 15th day of March, 1890, the plaintiff executed his one hundred negotiable bonds, payable to the Union Loan & Trust Company or bearer, for $1,000 each, secured by a trust deed to said company, as trustee, on lands in Woodbury and Plymouth counties, Iowa.

On June 17, 1890, he entered into a written agreement with the defendant reciting that the defendant had that day cancelled and surrendered to plaintiff the promissory notes enumerated,
369 aggregating $64,040.38; also that the bank had received from plaintiff said one hundred bonds, and that it was agreed that the bank and T. J. Stone should have and own 61 of said bonds, to be applied on the indebtedness surrendered. It was further agreed that the balance of said bonds should be sold by the defendant at not less than the face, and the proceeds applied towards paying liens and encumbrance upon the land prior to said trust deed. The said instrument shows that "to balance account to March 15, 1890, I have

this day given the First national bank note six months after date, with option on or before, for the sum of $3,040.30. June 17, 1890.
(Signed) D. H. TALBOT."

In March, 1892, the Union Loan & Trust Co., as trustee for this defendant, and T. J. Stone, its president, commenced an action against this plaintiff for judgment on said sixty-one bonds and to foreclose said trust deed. This plaintiff answered in said action, setting up said illegal charges of interest on overdrafts, and alleging that said interest had been included in the notes afterwards given, and that said notes were merged in the bonds in suit, and asking that an accounting be had of the amount of excessive interest charged, and that the amount so found be deducted from the amount due on the bonds. In support of this defense he introduced evidence of the amount of interest charged on overdrafts, and in the determination of the case the court found that excessive interest on overdrafts to the amount of $2,064.00 had been charged the plaintiff, and ordered that that amount, with interest at the rate named in the bonds, amounting in all to $2,069.46, be deducted from the amount due on the bonds, and judgment and decree were entered accordingly.

Thereafter the lands covered by the trust deed were sold under said decree for $87,699.15, leaving a balance of $11,141.05 unpaid on said judgment.

We have seen that unless the plaintiff has paid the illegal interest he is not entitled to recover it in this action. If it may be said that the delivery of the sixty-one bonds on June 17, 1890, was a payment, this action is barred, as it was not commenced "within two years from the time the usurious transactions occurred," having
370 been commenced March 8, 1895.

The interest on overdrafts was surely not paid by the sale of the land, for, as we have seen, it was not included in the decree. As we view the case, we think the illegal charges of interest have never been paid, and therefore the plaintiff is not entitled to recover in this action.

IV. There is some dispute as to whether plaintiff set up these charges of illegal interest in the action to foreclose the trust deed so as to constitute a former adjudication.

That he set it up and that it was adjudicated we have no doubt. True, it was not set up with the same fullness and elaboration as in this case. Unquestionably it is matter which might have been pled in that case, and under a familiar rule the plaintiff must be held to have asserted all available defenses to that action.

V. Said sec. 5198 provides that actions to recover back illegal interest paid must be commenced "within two years from the time the usurious transactions occurred." Now, whether or not we call the delivery of the bonds a payment, it is evident that the usurious transaction occurred on and before June 17, 1890, and it follows that this action is barred. These questions are so largely questions of fact and rest upon familiar and undisputed principles of law that we do not find it necessary to refer to any of the many authorities cited.

The lower court was fully warranted in affirming the findings of fact as reported by the referee. While we do not concur in the conclusions of law that the interest on overdrafts was excessive, but not illegal or usurious, and that the custom of banks to compute interest on the commercial basis of 30 days to the month is legal; still it does not follow that the judgment of the district court is erroneous.

It is correct, notwithstanding the charge of illegal interest, because the plaintiff has never paid that interest, but has been allowed the full benefit of the facts in the foreclosure case and because this action was not brought within two years of the time the usurious transaction occurred.

VI. A few days before the submission of this cause the plaintiff filed a motion to have certain matters not presented on the
371 trial below considered. He presents the affidavit of L. F. Wakefield, showing his estimate of the value of the lands covered by the trust deed, made at the instance of the defendant in February, 1894.

He also presents his own affidavit, touching the disposition made by him of certain mineral specimens, bird skins, reptiles, mammals, skins, books in library, public letter correspondence, and all other natural-history specimens in his possession to the State University of Iowa.

It is sufficient to say of this motion that only matters that were offered on the trial below can be considered on this appeal, and that the motion to have these matters considered must be overruled.

Affirmed.

Ladd, J., took no part.

372 DANIEL H. TALBOT, Appellant, *vs.* FIRST NATIONAL BANK OF SIOUX City, Iowa. } Appeal from Woodbury District Court.

In this cause the court, being fully advised in the premises, file their written opinion affirming the judgment of the district court.

It is therefore considered by the court that the judgment of the court below be, and it is hereby, affirmed, and that a writ of *procedendo* issues accordingly.

It is further considered by the court that the appellant pay the costs of this appeal, taxed at $19.75, and that execution issue therefore.

373 And afterwards a petition for rehearing was filed, and, the same having been fully considered, was overruled.

On the 17th day of September, 1900, there were filed in the office of the clerk of said court a petition for writ of error, assignment of errors, writ of error, bond, and citation, and the same are hereto attached in original form as a part of this transcript, true and correct copies thereof having been made and lodged in the office of said clerk.

374 Filed Sep. 17, 1900. C. T. Jones, Clerk Supreme Court.

In the Supreme Court of the State of Iowa.

DANIEL H. TALBOT, Plaintiff and Appellant,
v.
FIRST NATIONAL BANK OF SIOUX CITY, Iowa, Defendant and Appellee.
} Petition for Writ of Error.

And now comes Daniel H. Talbot, in proper person, the above-named plaintiff and appellant, and respectfully shows the court that on the 15th day of October, 1898, this court entered judgment herein in favor of the said defendant and appellee, First National Bank of Sioux City, Iowa, and against the appellant therein, this petitioner, in which judgment and the proceedings had prior thereunto in the said cause certain errors were committed to the prejudice of this petitioner, all of which will more fully and in detail appear from the assignment of errors filed herewith and made a part hereof.

This petitioner further shows that in the rendition of said judgment and in the proceedings had prior thereunto in this cause there was drawn in question and involved and specially set
375 up and claimed by petitioner a title, right, privilege, or immunity under a statute of the United States, to wit, under sections Nos. 5197 and 5198 of the Revised Statutes of the United States, and the decision in said judgment rendered was against the said title, right, privilege, or immunity so specially set up and claimed by your petitioner.

Wherefore your petitioner prays that writ of error may be issued in this behalf from the Supreme Court of the United States to this honorable court for a correction of the errors complained of, and that a transcript of the record and proceedings and papers in this cause may be duly authenticated and transmitted to the Supreme Court of the United States.

DANIEL H. TALBOT,
In Proper Person.

J. M. WILSON,
JAMES K. REDINGTON,
A. A. HOEHLING, JR.,
Of Counsel for Petitioner.

Writ allowed Sept. 14th, 1900.

C. T. GRANGER,
Chief Justice Supreme Court of Iowa.

376 *Assignments of Error.*

I.

The court erred in holding and deciding that plaintiff in error was barred from recovery under the limitation of section No. 5198 of the Revised Statutes of the United States, in this:

(*a*.) That it appears from the opinion of the court and the record in said case that the illegal and usurious interest involved in this suit was embraced in the certain series of promissory notes aggregating $64,040.38, which said notes were canceled in consideration of the delivery to the defendant by the plaintiff of one hundred certain negotiable bonds for $1,000 each, secured by deed of trust, in accordance with a certain agreement executed by plaintiff under date of June 17, 1890.

(*b*.) It further appears from said opinion and record that the said bonds were not paid, and that foreclosure proceedings were thereafter instituted in respect thereof, and that a judgment in foreclosure was entered in certain proceedings in that behalf had, said judgment being dated December 23, 1893, and that under said judgment in foreclosure sales were had of the lands embraced therein
377 under dates of March 19, 1894, May 19, 1894, and July 2, 1894, respectively; and that from said sales there was realized the sum of $87,699.15, and the same was applied in payment of the indebtedness hereinabove referred to, including therein said illegal and usurious interest.

(*c*.) The present suit was brought by plaintiff March 8, 1895, less than two years from the date of the judgment in foreclosure and of the several sales made thereunder and the application of said money to the payment aforesaid.

(*d*.) Under the foregoing facts, which appear of record and are undisputed, the court held that the usurious transaction, within the meaning of section 5198 of the Revised Statutes of the United States, "occurred on and before June 17, 1890," the latter date being, as above shown, not the date upon which any payment was made by the plaintiff, but the date upon which he entered into an agreement which involved an obligation to thereafter pay illegal and usurious interest.

(*e*.) That such finding and holding by the court is one which fixes the time at which the period of limitation prescribed by said section No. 5198 commences to run as the date when an obligation is entered into of the kind within the prohibition of that section, instead of the time when such illegal and usurious interest is actually paid.
378 (*f*.) That such finding and holding by the court is contrary to the express provisions of said section No. 5198; is contrary to the latest decision of the supreme court of the State of Iowa (Talbot *v*. Sioux National Bank of Sioux City, Iowa, May 22, 1900, not yet reported), and is contrary to the decision of the Supreme Court of the United States (Brown *v*. Marion National Bank, 169 U. S., 416, 420; see also McBroom *v*. Scottish Investment Company, 153 U. S., 318, 328, and cases cited).

II.

The court erred in holding and deciding that plaintiff in error was concluded by a former adjudication made in the case of The Union Loan & Trust Company, trustee, *v*. D. H. Talbot, Perkins Bros. Company, Davis & Company, comprised of Z. T. Davis and

Charles Davis, decided in the district court of Iowa in and for Woodbury county, in said State, in this:

(*a.*) That, as will appear from the record in this case, said suit in foreclosure (being the same suit in foreclosure hereinabove referred to) was instituted against the plaintiff herein and others for the foreclosure and sale of certain lands in satisfaction of the certain bonds hereinbefore referred to; that in said suit this plaintiff, as one of the defendants therein, filed answer, in which he alleged,
379 among other things, that on all amounts due by him and overdrafts entering into and embraced within said bonds he had been charged interest at the rate of ten per cent., compounded with monthly rests, and he therein prayed that an accounting might be had showing the amount of such interest charges and how computed, and finally, "that the amount of said overcharges of every kind be allowed defendant and be deducted from any alleged or claimed liability herein" (Record, p. 311).

(*b.*) That said defense embraced within said foreclosure proceedings was based upon the provisions of law at that time in force in the State of Iowa, which prohibited the receiving of interest in excess of the rates prescribed by the laws of said State, and which rate so attempted to be enforced and collected from plaintiff in said foreclosure suit, in respect of the matters in said answer referred to, was in excess of the rates so prescribed.

(*c.*) That it further appears from the record therein that the illegal and usurious interest was embraced within and was a part of the transaction and amount claimed by the plaintiff in said foreclosure suit.

(*d.*) That in said case the court adjudged that certain interest had been charged against this plaintiff in respect of overdrafts of his account so entering into said transaction and aggregate of indebtedness, as aforesaid, and that said illegal interest on said overdrafts amounted in the aggregate to $2,064.00, for which last amount credit was allowed this plaintiff as defendant in said fore-
380 closure suit and judgment entered therein against him in the sum of $94,578.90, together with costs, and which said amount included all interest on account of the principal indebtedness and excluded no interest whatever except the illegal interest on the overdrafts, as hereinbefore stated.

(*e.*) That the scope and effect of the defense so interposed by this plaintiff in such foreclosure suit was solely in respect of the charge for interest on overdrafts in excess of that permitted by the laws of the State of Iowa, in which said transactions occurred, and did not seek a forfeiture of the entire interest which accrued on said transactions, as authorized and required by the provisions of said section No. 5198, *supra*.

(*f.*) That said last-named section of the Revised Statutes of the United States, in express and positive terms, directs "a forfeiture of the entire interest" which the transaction carries with it, and does not permit or authorize a forfeiture merely of the amount of interest paid in excess of that allowed by law.

(*g.*) That said section No. 5198 further provides that in case the

greater rate of interest has been paid, the person so paying the same "may recover back * * * twice the amount of the interest thus paid."

(*h.*) That under the above facts, which are undisputed and appear of record, the court herein held that said defense so interposed by this plaintiff and the judgment of the court entered in said foreclosure suit constituted a former adjudication in respect of the remedy afforded and penalties prescribed by said section No. 5198, whereas, as hereinbefore shown, that section had not been invoked by this plaintiff in said foreclosure suit in any respect, and no recovery of any amount had been had or credit given him, as in said section directed.

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(*i.*) The court further erred in holding and deciding that because of the allowance to this plaintiff in said foreclosure suit of the said sum of $2,064.00, the amount of illegal interest on overdrafts and credit given him therefor in the entry of judgment in that case he had not in fact paid any illegal and usurious interest within the prohibition of said section No. 5198, whereas the record in this case discloses that the illegal and usurious interest charged against this plaintiff in said transactions in which said judgment in foreclosure was entered embraced said charges of illegal and usurious interest and therein and thereby affected and forfeited the entire interest in connection with said transactions, as is expressly provided and directed in said section No. 5198.

III.

The court erred in holding and deciding that any title, right, privilege, or immunity vesting in the plaintiff in error under section No. 5198 of the Revised Statutes was involved in any issue made in or was determined by judgment entered in the foreclosure suit above mentioned.

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IV.

The court erred in affirming the judgment of the trial court in entering judgment against the plaintiff, whereas, under the law and facts, the judgment of the trial court should have been reversed.

DANIEL H. TALBOT,
In Proper Person.

J. M. WILSON,
JAMES K. REDINGTON,
A. A. HOEHLING, JR.,
Of Counsel for Plaintiff in Error.

383 [Endorsed:] Petition.

384 Filed Sep. 17, 1900. C. T. Jones, Clerk Supreme Court.

Writ of Error to a State Supreme Court.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Daniel H. Talbot, plaintiff, and First National Bank of Sioux City, Iowa, defendant, upon the fifteenth (15th) day of October, at the October term, 1898, thereof, wherein *that* in the rendition of said judgment and in the proceedings had prior thereunto in this cause there was drawn in question and involved and specially set up and claimed by petitioner a title, right, privilege, or immunity under a statute of the United States, to wit, under sections Nos. 5197 and 5198 of the Revised Statutes of the United States, and the decision in said judgment rendered was against the said title, right, privilege, or immunity so specially set up and claimed by plaintiff, a manifest error hath happened, to the great damage of the said Daniel H. Talbot, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid and all things concerning the same, together with this writ, at Washington, District of Columbia, and filed in the office of the clerk of the United States Supreme Court, on or before the fourteenth day of October next, in the said Supreme Court to be then and
385 there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this fourteenth day of September, in the year of our Lord one thousand nine hundred.

[Seal U. S. Circuit Court, Southern District Iowa.]

EDWARD R. MASON,
Clerk of the United States Circuit Court
for the Southern District of Iowa.

Allowed by—
C. T. GRANGER,
Chief Justice of the Supreme Court of Iowa.

[Endorsed:] Writ of error.

386 Filed Sep. 17, 1900. C. T. Jones, Clerk Supreme Court.

American Surety Company of New York.

Cash capital, $2,500,000.

The largest and strongest surety company in the world.

Court and contract bonds executed at Sioux City office.

In the Supreme Court of the State of Iowa.

DANIEL H. TALBOT, Plaintiff and Appellant,
vs.
FIRST NATIONAL BANK OF SIOUX CITY, IOWA, Defendant and Appellee.

Know all men by these presents that Daniel H. Talbot, as principal, and American Surety Company of New York, as sureties, are held and firmly bound *the unto* First National Bank of Sioux City, Iowa, in the sum of two hundred and fifty dollars, to be paid to the said First National Bank of Sioux City, Iowa, or its successors and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 13th day of September, A. D. 1900.

Whereas the above-named Daniel H. Talbot has caused a writ of error to be sued out from the Supreme Court of the United States to the supreme court of the State of Iowa to reverse the judgment in the above-entitled cause rendered by the said supreme court of the State of Iowa affirming the judgment of the district court of Woodbury county, Iowa, in the above-entitled cause:

Now, therefore, the condition of this obligation is such that if the above-named Daniel H. Talbot shall prosecute said writ of error to effect and answer all costs if he shall fail to make good the said writ of error, then this obligation shall be void; otherwise to remain in full force and virtue.

DANIEL H. TALBOT, *Principal.*

[Seal American Surety Company, New York.]

AMERICAN SURETY COMPANY
OF NEW YORK,
By E. W. RICE, *Res. Vice-President, and*
JAMES DOUGHTY, *Res. Ass't Sec'y.*

Witness:
G. N. SWAN,
Sioux City, Ia.

The above bond is approved this 14th day of Sept., 1900.
C. T. GRANGER,
Chief Justice Supreme Court of Iowa.

387 [Endorsed:] No. —. In — court, — county. Daniel H. Talbot *vs.* First National Bank of Sioux City, Ia. Appeal bond. Amount, $250.00. Filed and approved this — day of ——, 189–. —— ——, clerk; —— ——, deputy. Surety on bonds. American Surety Co. of New York, the largest surety company in the world. The local board at Sioux City, Iowa, is authorized to execute bonds and undertakings in lieu of private sureties in the following cases: Administrators, appeal, arrest, assignees, attachment, capias, conservators, committee of lunatic, common carriers, contractors, curators, executors, for demurrage, grain elevators, guardians, guardians *ad litem*, indemnity, indemnity to sheriff, injunction, land damage, maritime libel, official, receivers, replevin, security for costs, non-resident plaintiff, trustees, warehousemen. Local boards in all of the principal cities in the United States. Sioux City local board: Eugene W. Rice, res. vice-president James H. Bolton, Leonard L. Kellogg, H. S. Hubbard, Wm. H Beck. James Doughty, manager and attorney. Bolton block. Tel 211, Home telephone.

{Two-cent United States internal-revenue stamp, canceled 9, 13, 1900. Am. Sur. Co.}

{Two-cent United States internal-revenue stamp, canceled 9, 13, 1900. Am. Sur. Co.}

388 In the Supreme Court of the State of Iowa.

DANIEL H. TALBOT, Plaintiff and Appellant,
vs.
FIRST NATIONAL BANK OF SIOUX CITY, IOWA, Defendant and Appellee.

The United States of America to the First National Bank of Sioux City, Iowa, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, District of Columbia, on the fourteenth day of October, 1900, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein Daniel H. Talbot — plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable C. T. Granger, chief justice of the supreme court of Iowa, this 14th day of September, in the year of our Lord one thousand nine hundred.

[Seal of the Supreme Court of Iowa.]

C. T. GRANGER,
Chief Justice Supreme Court of Iowa, with the Seal of said Court Attached.

Service accepted and acknowledged this 19th day of September, 1900.

FIRST NATIONAL BANK OF SIOUX CITY,
By WRIGHT, CALL & HUBBARD, *Its Attorneys.*

[Endorsed:] Citation.

389 THE STATE OF IOWA, *ss:*

I, C. T. Jones, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record and proceedings of a case tried and decided in said court between Daniel H. Talbot, plaintiff and appellant, and First National Bank of Sioux City, Iowa, defendant and appellee, to wit, the abstract, amended abstract, and a motion and exhibits, being the record whereon said cause was submitted, the record of submission and decision and final judgment rendered therein, as full, true, and complete as the same are of record or on file in my office.

And I further certify that the petition for writ of error, writ of error, bond, citation, and assignment of errors are attached to the foregoing transcript in original form and are transmitted herewith as part of the return to said writ of error, and this return is made in obedience to said writ.

In testimony whereof witness my signature and seal of office, at Des Moines, Iowa, this 20th day of September, 1900.

[Seal of the Supreme Court of Iowa.]

C. T. JONES,
Clerk of the Supreme Court of Iowa.

390 In the Supreme Court of the United States, October Term, 1900.

DANIEL H. TALBOT, Plaintiff in Error,
v.
THE FIRST NATIONAL BANK OF SIOUX CITY, IOWA, Defendant in Error. } No. 427.

The above-named plaintiff in error hereby gives notice that upon the hearing of said cause in this court he will rely upon the assignments of error attached to the petition for writ of error and on file herein, said assignments of error being as follows:

391 I.

The court erred in holding and deciding that plaintiff in error was barred from recovery under the limitation of section No. 5198 of the Revised Statutes of the United States, in this:

(*a.*) That it appears from the opinion of the court and the record in said case that the illegal and usurious interest involved in this suit was embraced in the certain series of promissory notes aggregating $64,040.38, which said notes were canceled in consideration of the delivery to the defendant by the plaintiff of one hundred

certain negotiable bonds for $1,000 each, secured by deed of trust, in accordance with a certain agreement executed by plaintiff under date of June 17, 1890.

(*b.*) It further appears from said opinion and record that the said bonds were not paid and that foreclosure proceedings were thereafter instituted in respect thereof, and that a judgment in foreclosure was entered in certain proceedings in that behalf had, said judgment being dated December 23, 1893, and that under said judgment in foreclosure sales were had of the lands embraced therein under dates of March 19, 1894, and July 2, 1894, respectively, and that from said sales there was realized the sum of $87,699.15, and that the same was applied in payment of the indebtedness hereinabove referred to, including therein said illegal and usurious interest.

(*c.*) The present suit was brought by plaintiff March 8, 1895, less than two years from the date of the judgment in foreclosure and of the several sales made thereunder and the application of said money to the payment aforesaid.

(*d.*) Under the foregoing facts, which appear of record and are undisputed, the court held that the usurious transaction, within the meaning of section 5198 of the Revised Statutes of the United States, "occurred on and before June 17, 1890," the latter
392 date being, as above shown, not the date upon which any payment was made by the plaintiff, but the date upon which he entered into an agreement which involved an obligation to thereafter pay illegal and usurious interest.

(*e.*) That such finding and holding by the court is one which fixes the time at which the period of limitation prescribed by said section No. 5198 commences to run as the date when an obligation is entered into of the kind within the prohibition of that section instead of the time when such illegal and usurious interest is actually paid.

(*f.*) That such finding and holding by the court is contrary to the express provisions of said section No. 5198, is contrary to the latest decision of the supreme court of the State of Iowa (Talbot *vs.* Sioux National Bank of Sioux City, Iowa, May 22, 1900, not yet reported), and is contrary to the decision of the Supreme Court of the United States (Brown *vs.* Marion National Bank, 169 U. S., 416, 420; see also McBroom *vs.* Scottish Investment Company, 153 U. S., 318, 328, and cases cited).

II.

The court erred in holding and deciding that plaintiff in error was concluded by a former adjudication, made in the case of The Union Loan and Trust Company, *tur*stee, *vs.* D. H. Talbot, Perkins Bros. Company, Davis & Company, comprised of Z. T. Davis and Charles Davis, decided in the district court of Iowa in and for Woodbury county, in said State, in this:

(*a.*) That, as will appear from the record in this case, said suit in foreclosure (being the same suit in foreclosure hereinabove referred to) was instituted against the plaintiff herein and others for the foreclosure and sale of certain lands in satisfaction of the certain bonds hereinbefore referred to; that in said suit this plaintiff, as one

of the defendants therein, filed answer, in which he alleged,
393 among other things, that on all amounts due by him and overdrafts entering into and embraced within said bonds he had been charged interest at the rate of ten per cent. compounded with monthly rests, and he therein prayed that an accounting might be had showing the amount of such interest charges and how computed, and finally "that the amount of said overcharges of every kind be allowed defendant and be deducted from any alleged or claimed liability herein" (Record, p. 311).

(*b.*) That said defense embraced within said foreclosure proceedings was based upon the provisions of law at that time in force in the State of Iowa, which prohibited the receiving of interest in excess of the rates prescribed by the laws of said State, and which rate so attempted to be enforced and collected from plaintiff in said foreclosure suit, in respect of the matters in said answer referred to, was in excess of the rates so prescribed.

(*c.*) That it further appears from the record therein that the illegal and usurious interest was embraced within and was a part of the transaction and amount claimed by the plaintiff in said foreclosure suit.

(*d.*) That in said case the court adjudged that certain interest had been charged against this plaintiff in respect of overdrafts of his account so entering into said transaction and aggregate of indebtedness, as aforesaid, and that said illegal interest on said overdrafts amounted in the aggregate to $2,064, for which last amount credit was allowed this plaintiff as defendant in said foreclosure suit and judgment entered therein against him in the sum of $94,578.90, together with costs, and which said amount included all interest on account of the principal indebtedness and excluded no interest whatever except the illegal interest on the overdrafts as hereinbefore stated.

(*e.*) That the scope and effect of the defense so interposed
394 by this plaintiff in such foreclosure suit was solely in respect of the charge for interest on overdrafts in excess of that permitted by the laws of the State of Iowa, in which said transactions occurred, and did not seek a forfeiture of the entire interest which accrued on said transactions, as authorized and required by the provisions of said section No. 5198, *supra.*

(*f.*) That said last-named section of the Revised Statutes of the United States, in express and positive terms, directs "a forfeiture of the entire interest" which the transaction carries with it, and does not permit or authorize a forfeiture merely of the amount of interest paid in excess of that allowed by law.

(*g.*) That said section No. 5198 further provides that in case the greater rate of interest has been paid the person so paying the same "may recover back * * * twice the amount of the interest thus paid."

(*h.*) That under the above facts, which are undisputed and appear of record, the court herein held that said defense so interposed by this plaintiff and the judgment of the court entered in said foreclosure suit constituted a former adjudication in respect of the remedy afforded and penalties prescribed by said section No. 5198,

whereas, as hereinbefore shown, that section had not been invoked by this plaintiff in said foreclosure suit in any respect, and no recovery of any amount had been had or credit given him, as in said section directed.

(*i.*) The court further erred in holding and deciding that because of the allowance to this plaintiff in said foreclosure suit of the said sum of $2,064, the amount of illegal interest on overdrafts and credit given him therefor in the entry of judgment in that case, he had not in fact paid any illegal and usurious interest within the
395 prohibition of said section No. 5198, whereas the record in this case discloses that the illegal and usurious interest charged against this plaintiff in said transactions in which said judgment in foreclosure was entered embraced said charges of illegal and usurious interest, and therein and thereby affected and forfeited the entire interest in connection with said transactions, as is expressly provided and directed in said section No. 5198.

III.

The court erred in holding and deciding that any title, right, privilege, or immunity in the plaintiff in error, under section No. 5198 of the Revised Statutes of the United States, was involved in any issue made in or was determined by judgment entered in the foreclosure suit above mentioned.

IV.

The court erred in affirming the judgment of the trial court in entering judgment against the plaintiff, whereas under the law and facts the judgment of the trial court should have been reversed.

396 The plaintiff hereby designates, under the provisions of rule 10, paragraph 9, of the rules of this court, the following parts of the record on file herein as the parts thereof to be printed:

Plaintiff's amended and substituted petition, p. 9–104.

Defendant's answer to amended petition and Exhibit "1" to said answer, p. 104–110.

Plaintiff's rejoinder, 110.

Plaintiff's Evidence.

Testimony of D. H. Talbott,	recall,	111–135.
" " " "	rebuttal,	317–321.
" " J. B. Keefe,		
" " " "	recall,	

Exhibit "4," 184–194, $5.

Defendant's Evidence.

Testimony of E. H. Stone,
" " A. F. Call,
" " F. R. Gaynor,
" " S. M. Marsh,
} 195–215.

Exhibit "B," 217–219, 5.
" "D," 275–283.
" "E," 283–292.

(NOTE.—Omit in printing said Exhibit "E," the copy of mortgage bond and coupons attached thereto, copy of said bond
397 and coupons having been already designated for printing as Exhibit "D;" also omit in printing said Exhibit "E," the copy attached thereto of the agreement of June 17, 1890, the latter having been also above designated for printing as Exhibit No. 1 to defendant's answer to amended petition.)

Exhibit "F," 310.
" "G," 312.
" "H," 316.

Report of referee, 323.

The plaintiff's exceptions to referee's report, 329.

Order and decree of the court of March 19, 1896, dismissing plaintiff's petition, etc., 331.

All of the amended and additional abstract, 341–351.

Opinion of the supreme court of the State of Iowa, 366–373.

Petition for writ of error herein and assignments of error accompanying same, 374–381.

J. M. WILSON.
JAMES K. REDINGTON.
A. A. HOEHLING, JR.

397½ [Endorsed:] In the Supreme Court of the United States, October term, 1900. No. 427. Daniel H. Talbot, pl't'ff in error, *v.* The First Nat'l Bank of Sioux City, Ia., def't in error. Statement of errors and designation of parts of record to be printed. J. M. Wilson, James K. Redington, A. A. Hoehling, Jr., counsel for plaintiff in error.

398 [Endorsed:] File No., 17,912. Supreme Court U. S., October term, 1900. Term No., 427. Daniel H. Talbot, P. E., *vs.* The First National Bank of Sioux City, Iowa. Statement of errors and designation by plaintiff in error of parts of record to be printed. Filed Dec. 26, 1900.

399 In the Supreme Court of the United States.

DANIEL H. TALBOT, Plaintiff in Error,
v.
THE FIRST NATIONAL BANK OF SIOUX CITY, Iowa, Defendant in Error.
} October Term, 1900. No. 427.

I, James K. Redington, being first duly sworn, depose and say: That I am one of counsel for plaintiff in error in the above-entitled cause, and that upon the 26th day of December, 1900, I caused a full and true copy of the statement of errors upon which plaintiff in error intends to rely, and also of the parts of the record which he designates under the provisions of rule 10, paragraph 9, to be printed, the original of all of the same being this day filed in said cause in this court, to be deposited in the registered mail at Washington, D. C., addressed to Asa F. Call, attorney of record in this court for the defendant in error, to his post-office address, Sioux City, Iowa, as will more fully appear by reference to post-
400 master's registered letter receipt hereto attached and made a part hereof.

JAMES K. REDINGTON.

Subscribed and sworn to before me this 26th day of December, 1900.

[Seal of Grafton L. McGill, Notary Public, District of Columbia.]

GRAFTON L. McGILL,
Notary Public.

Registered { letter. / parcel* } No. 1276, P. O., Washington, D. C.

Received, Dec. 26, '00, *189–*, of Jas. K. Reddington a { letter / parcel } addressed to Asa F. Call, Sioux City, Iowa.

JAMES P. WILLETT, *P. M.*,
Per W.

[Endorsed:] In the Supreme Court of the United States, October term, 1900. Daniel H. Talbot, pl't'ff in error, *v.* The First Nat'l Bank of Sioux City, Ia., def'd't in error. No. 427. Affidavit as to service of specifications of error and designation of parts of record to be printed. J. M. Wilson, James K. Redington, A. A. Hoehling, Jr., counsel for plaintiff in error.

401 [Endorsed:] File No., 17,912. Supreme Court U. S., October term, 1900. Term No., 427. Daniel H. Talbot, P. E., *vs.* The 1st National Bank of Sioux City, Iowa. Proof of service of statement of errors and designation. Filed Dec. 27, 1900.

Endorsed on cover: File No., 17,912. Iowa supreme court. Term No., 164. Daniel H. Talbot, plaintiff in error, *vs.* The First National Bank of Sioux City, Iowa. Filed September 26, 1900.

[* Erased in copy.]

Filed Nov. 4, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 164.

DANIEL H. TALBOT, PLAINTIFF IN ERROR,

vs.

THE FIRST NATIONAL BANK OF SIOUX CITY, IOWA, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR IN RESISTANCE OF MOTION TO DISMISS OR AFFIRM.

JAMES K. REDINGTON,
A. A. HOEHLING, JR.,
Counsel for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1899

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 164.

DANIEL H. TALBOT, PLAINTIFF IN ERROR,

vs.

THE FIRST NATIONAL BANK OF SIOUX CITY, IOWA, DEFENDANT IN ERROR.

Brief on Behalf of Plaintiff in Error in Resistance of Motion to Dismiss or Affirm.

STATEMENT.

This action was brought by the plaintiff in error, as plaintiff in the court below, against the defendant in error, as defendant below, under sections 5197 and 5198 of the Revised Statutes of the United States, to recover the sum of $94,040.74. The defendant is a banking association created and organized under the laws of the United States and located and doing business in the State of Iowa.

Section 5197 of the Revised Statutes provides that any banking association subject to its provisions may take, receive, reserve, and charge upon loans, discounts, notes, bills of exchange, or other evidences of debt interest at the rate allowed by the laws of the State wherein the bank is located,

but no more. The legal rate of interest in the State of Iowa at the date of the transactions hereinafter mentioned, in the absence of any specific contract between the parties, was 6 per cent. per annum, computed according to the calendar year and month (Code of Iowa, 1873, secs. 2077 and 45).

Section 5198 of the Revised Statutes is as follows:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

In support of the action, it is alleged in substance by the plaintiff, in his amended and substituted petition (Rec., pp. 1 to 57), or otherwise appears in the record as part of his case, that from January 1, 1886, to June 17, 1900, he was a depositor in and borrower from the defendant association; that during this time he transacted a continuous, if not daily, business with said association, making deposits, drawing checks, in many instances in excess of credit, and giving said association notes from time to time to settle balances appearing to be due; that in making settlement upon its books with plaintiff, the defendant was in the habit, monthly, of charging against plaintiff, as a debit, the amount of 10 per cent. per annum upon all overdrafts during the preceding month, and in these computations reckoned the month as thirty days instead of the calendar month; that these charges of interest upon overdrafts were carried into the notes above referred to as given from time to time, and that these transactions so continued down to June 17, 1900.

In support of plaintiff's action it further, by said amended petition and record, appears that upon the 17th day of June, 1890, the plaintiff, to settle and liquidate his then outstanding notes, given as aforesaid, amounting in all to $64,040.38, including said interest charges upon overdrafts, executed to the Union Loan and Trust Company of Sioux City one hundred bonds, of the par value of $1,000 each, secured by mortgage of certain lands of the plaintiff in Iowa. Thirty-nine of said bonds were to be sold by said trust company at not less than par and the proceeds applied to the payment of prior liens upon the land; sixty-one of said bonds became the property of the defendant, in lieu of plaintiff's notes, to the amount and for par value of said sixty-one bonds, and for the balance then appearing due defendant, plaintiff executed his promissory note to defendant for $3,040.30 (Rec., Exhibit "1," p. 60; Exhibit D, form of bond, p. 103). Default having been made in the interest upon these bonds, the Union Loan and Trust Company, as trustee for defendant, April 27, 1892, commenced foreclosure proceedings (Rec., p. 107), which resulted, December 23, 1893, in a final decree (Rec, p. 121) adjudging plaintiff indebted to defendant and T. J. Stone in the sum of $94,578.90, foreclosing the mortgage, and directing sale of the premises. The mortgaged property was sold in execution of this decree, March 19, 1894, May 19, 1894, and July 2, 1894, and said sale realized $87,699.15, which was received by defendant, leaving a judgment balance against plaintiff of $11,141.50 (Ref. Report, Rec., p. 129).

The amount of usurious interest paid by plaintiff to defendant in, by, and through these various transactions is alleged to be $47,020.37, and the suit is to recover that amount and a like amount as penalty, amounting in all to $94,040.74, under section 5198 of the Revised Statutes above cited.

The answer of the defendant (Rec., pp. 57–60) was in substance:

(1.) A denial that the plaintiff had paid usurious interest as alleged.

(2.) That all sums charged by defendant against plaintiff for interest or otherwise were merged in the issue of the bonds June 17, 1890, whereby the plaintiff paid defendant all sums charged for interest or otherwise, and that inasmuch as this suit was not brought within two years after said 17th day of June, 1890, it was barred by the limitation of section 5198 of the Revised Statutes.

(3.) That in the foreclosure suit a full accounting was had between the parties after plaintiff herein had set up in defense his claim to illegal interest in connection with said transactions, and that plaintiff herein is therefore bound by the decree in said foreclosure suit and is estopped thereby.

Upon issue joined the cause went to a referee; testimony before such referee was taken (Rec., pp. 62–127); report of referee was made to the court (Rec., pp. 127–129); said report, after exceptions filed, was approved by the trial court (Rec., pp. 130, 131), and this judgment, upon appeal, was affirmed by the supreme court of the State (Rec., p. 142).

The supreme court of the State, in disposing of the case, held and decided as follows:

1. That in the transactions complained of, the defendant charged plaintiff as interest a rate greater than that allowed by the laws of the State; but that, nevertheless, plaintiff could not recover in the present suit, because:

2. The action, not being one to forfeit the entire interest, but a suit to recover back said interest, with penalty, under section 5198 of the Revised Statutes, it was incumbent upon the plaintiff to show that said interest had been paid; that if such interest was paid by the delivery of the bonds June 17, 1890, then the action is barred because not commenced

within two years from the date of that transaction, and that interest upon the overdrafts was not paid by the sale of the land because such interest was not included in the decree.

3. Plaintiff is barred in respect to the matters in controversy by the decree in the foreclosure suit as a prior adjudication.

To review the foregoing judgment, plaintiff brought the case to this court upon writ of error, and thereupon defendant filed its motion to dismiss or affirm, which motion, upon due notice, now comes before the court for consideration.

Counsel for defendant in error, in his brief in support of the motion to dismiss for want of jurisdiction, submits in substance the following propositions:

1. That the question whether the plaintiff actually paid excessive interest through the sale of his property is one of fact; that the finding of the court below is that no such payment was made, and that this question in no way involves the validity, construction, or applicability of section 5198 of the Revised Statutes.

2. That the question of former adjudication is likewise one of fact not involving any Federal question.

3. That the question whether the action is barred by limitation is also one of fact, not involving, in any way, the construction or validity of a statute of the United States.

The motion to affirm upon the merits is submitted by counsel without practical argument.

BRIEF.

On behalf of the plaintiff in error, we submit, without extended or detailed argument, that the pending motion should be denied.

At the outset, we suggest that three important considerations should be clearly borne in mind, viz:

(1.) That the action at bar is based solely and entirely upon a Federal statute, to wit, section 5198 of the Revised Statutes of the United States. No law of the State confers the remedy here invoked. That remedy arises exclusively by virtue of this Federal statute, and depends entirely, in its allowance or denial, upon the construction to be given this particular section. If the plaintiff in error is entitled to anything at all, it is by virtue of a title, right, privilege, or immunity specially set up under this particular act of Congress. If such title, right, privilege, or immunity has been denied him in the application of this section of the Revised Statutes to the facts established in the case, then, clearly, the questions involved are Federal and are entitled to review in this court.

(2.) That the judgment of the supreme court of the State of Iowa, here sought to be reviewed, specifically finds, as a matter of fact, that a higher rate of interest was charged by the defendant in error against plaintiff in error, in the various transactions shown by the evidence, than was allowed by said section 5198 of the Revised Statutes of the United States.

(3.) That, for the purposes of this motion at least, it is to be assumed that the plaintiff in error was entitled to recover against the defendant in error, and that judgment would have so followed had it not been for that application, by the court below, of the law to the facts, which held:

(*a.*) That if the illegal interest was paid by the delivery of the bonds in 1890, then the action was barred by the limitation of section 5198.

(*b.*) That the illegal interest charged was not paid by the sale of the land, because such illegal interest was not included in the decree of foreclosure.

(*c.*) That the plaintiff was barred by the decree in the foreclosure suit as a prior adjudication.

Starting then with the fact that in the transactions in respect to which complaint is made, there was an actual charge against the plaintiff in error of a rate of interest prohibited by law, we then submit that the denial, by the supreme court of the State, of the remedy sought upon each one of the enumerated grounds, involved the construction of section 5198 of the Revised Statutes, and that a Federal question was thus, in each instance, involved reviewable by this court.

(*a.*)

DELIVERY OF BONDS, LIMITATION.

In this connection, the court below, after finding as a matter of fact that illegal interest had been charged, decided, nevertheless, that the plaintiff, even if the delivery of the bonds in 1890 amounted to a payment of the interest, could not recover because suit was barred by the limitation of two years mentioned in section 5198. The delivery of the bonds in 1890 was established by evidence and found by the court. Whether that amounted to a payment of the illegal interest, the court does not, as a matter of law, decide. Assuming it to have been a payment, however, the court held that action was then barred.

This, we submit, was beyond all question a construction

of the limitation clause of section 5198, and as such was a decision of a Federal question. This section provides that suit to enforce the remedy previously conferred must be commenced "within two years from the time the usurious transaction occurred." In passing upon the question here particularly under consideration, the court below was necessarily compelled to construe this language of section 5198 as applied to the established facts in the case, and the decision was that plaintiff, by the delivery of the bonds in question, if that transaction amounted to a payment, thus paid the illegal interest more than two years prior to "the time the usurious transaction occurred." In other words, a Federal statute, solely applicable to the situation, defined, in somewhat exceptional language, the point of time from which a limitation should run. The court, considering and construing this language of this statute alone, held and decided that under established facts in the case the limitation would commence to run from a particular point of time. The body of the section gave plaintiff the right to recover; the proviso barred such recovery unless action was brought within a certain limitation. This limitation was specially pleaded by defendant, and the court, considering the established facts, gave a particular construction to the words of the limitation clause. How can this be considered otherwise than as a construction of a Federal statute and as the decision of a Federal question? Plaintiff certainly asserted a title, right, or privilege under a statute of the United States, and the decision of the court in this particular connection was clearly against the title, right, or privilege so asserted. We submit that under such circumstances a Federal question was involved, and that this court has jurisdiction of the cause.

We add, in this connection, that it is immaterial whether, in law, the delivery of the bonds was or was not a payment of the illegal interest. As long as it is possible that the court below or this court could hold such delivery to be a payment, the point decided by the court was necessarily in-

volved and was decided against the contention of the plaintiff.

(*b.*)

SALE OF THE LAND; WAS ILLEGAL INTEREST PAID THEREBY?

The court below, in its opinion, held that the illegal interest charged was not paid by a sale of the land, because such interest was not included in the foreclosure decree.

It has been settled by this court that within the meaning of section 5198 of the Revised Statutes usurious interest is not paid by renewals of the original note or by merger of the original illegal transaction in some new evidence of debt or obligation. Payment of the illegal interest in this case was not, therefore, made by the delivery of the bonds in 1890.

Brown *vs.* Marion National Bank, 169 U. S., 416.

It is equally clear that such payment was made by the sale of the premises in controversy and the appropriation of the proceeds of such sale by the defendant in error to the part satisfaction of its claim.

Brown *vs.* Marion National Bank, 169 U. S., 416.
McBroon *vs.* Scottish Mortgage, etc., Co., 153 U. S., 318.

The position taken by the court below, excepting the case at bar from the general rule of the above-cited adjudications, upon the ground that the plaintiff's claim in respect to illegal interest had been presented and allowed in the foreclosure suit, is untenable. This particular question is disposed of by the discussion which here immediately follows under the succeeding proposition.

As the question here immediately under consideration arises and is necessarily to be decided in contemplation of section 5198 of the Revised Statutes of the United States, such question is necessarily Federal in character and this court has jurisdiction.

(c.)

DECREE IN FORECLOSURE SUIT AS FORMER ADJUDICATION.

The decision of the court below was also to the effect that the plaintiff was barred by the final decree in the foreclosure suit as a prior adjudication. This holding was upon the theory that the plaintiff in error, the defendant in the foreclosure suit, had, in defense of the foreclosure, introduced evidence of the excessive interest charged on overdrafts, and had been allowed this amount in the making up and rendition of the judgment in said suit.

This, we submit, was clear misapprehension of the position of the plaintiff in error in the two suits. The court below must have overlooked the consideration that the subject-matter of the suit here pending is entirely different and distinct, both in character and amount, from any matter or amount which could have been pleaded by the defendant in the foreclosure suit. The suit at bar, as hereinbefore stated, is brought under the second provision of section 5198, which confers upon one who has paid a greater interest than that allowed by law the right to recover back the whole of such interest, with an equal amount added as penalty. In the prior foreclosure suit, it is possible that the defendant might have claimed a forfeiture of the entire interest, but that could not by any possibility bar him from the assertion of a statutory right which did not accrue until after the termination of the foreclosure suit and the sale of the premises under the decree of the court.

The remedy given by the statute for the wrong is a penal suit, and, as has been heretofore uniformly held by this court, such aggrieved party can have redress in no other mode or form of procedure, either by way of counter-claim, set-off, or otherwise.

Farmers & Mechanics' National Bank *vs.* Dearing, 91 U. S., 29.

Barnett *vs.* National Bank, 98 *ib.*, 555–559.

The right of the plaintiff to sue for the recovery of the illegal interest and added penalty, under section 5198, did not accrue until the termination of the foreclosure suit, the sale of the property under the final decree, and the appropriation of such sale by the defendant in error. Then, for the first time, was the illegal interest *paid*. Up to that point of time there was nothing arising out of this provision of section 5198 which the plaintiff in error could by any possibility have taken advantage of in the foreclosure suit. Under such circumstances it is impossible to conceive of any rule, or variation of the rule, of *stare decisis* which would, in the present proceeding, bar him by what was then adjudicated.

The Federal question involved, under this particular head of our discussion, is entirely obvious. The court practically held the plaintiff in error to be barred because he did not invoke a remedy under a Federal statute, while, as matter of law, the particular defense suggested did not arise and could not arise until the termination of the foreclosure suit. This holding is peculiarly a denial to the plaintiff in error of a right arising under a Federal statute and claimed by him.

In connection with the disposition of the pending motion, it is proper that we should invite the attention of the court to the fact that a similar case, Daniel H. Talbot, plaintiff in error, *vs.* The Sioux National Bank of Sioux City, Iowa, defendant in error, October term, 1901, No. 190, awaits hearing upon the calendar. In this last-mentioned case, counsel for defendant in error filed a motion to dismiss or affirm, which motion, at the last term of this court, was overruled. The legal questions involved in the two cases are in greater part identical. Counsel for plaintiff in error in the case at bar are also counsel for plaintiff in error in said case No. 190, and counsel for defendant in error in the two cases are in part the same. It is the purpose of counsel for plaintiff in error in the two cases to ask the court to assign the case

at bar for argument along with said other case, No. 190, when said latter case shall be reached in its regular order.

MOTION TO AFFIRM SHOULD BE OVERRULED.

Inasmuch as counsel for defendant in error have not, in their printed brief herein, submitted any argument in support of their motion to affirm the judgment herein, it is assumed by counsel for plaintiff in error that no reliance is placed by counsel for defendant in error upon said motion to affirm, and we will therefore not here undertake a detailed examination and presentation of this controversy upon the merits.

It is therefore respectfully submitted that both of the motions herein should be overruled.

JAMES K. REDINGTON,
A. A. HOEHLING, JR.,
Counsel for Plaintiff in Error.

No. 164.

Brf. of Redington & Hoehl

FILED
FEB 21 1902
JAMES H. McK

Filed Feb. 21, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 164.

DANIEL H. TALBOT, PLAINTIFF IN ERROR,

vs.

THE FIRST NATIONAL BANK OF SIOUX CITY, IOWA, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

JAMES K. REDINGTON,
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Counsel for Plaintiff in Error.

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THE FIRST NATIONAL BANK OF SIOUX CITY, IOWA, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT.

This action was brought by plaintiff in error against the defendant in error, a banking association created and organized under the laws of the United States and located and doing business in the State of Iowa, under sections 5197 and 5198 of the Revised Statutes of the United States, to recover twice the amount of interest paid said defendant in certain transactions had between it and plaintiff.

Section 5197, R. S. U. S., provides that any banking association subject to its provisions may take, receive, reserve, and charge upon loans, discounts, notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State wherein the bank is located, but no more.

The legal rate of interest in the State of Iowa at the date of the transactions hereinafter mentioned, in the absence of any specific contract between the parties, was 6 per cent. per annum, computed according to the calendar year and month (Code of Iowa, 1873, secs. 2077 and 45).

Section 5198, R. S. U. S., provides:

"The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two years from the time the usurious transaction occurred."

The record herein discloses that from January 1, 1886, to June 17, 1900, plaintiff was a depositor in and borrower from defendant association; that during this time he transacted a continuous, if not daily, business with said association, making deposits, drawing checks—in many instances in excess of credit—and giving said association notes from time to time to settle balances appearing to be due, a true, correct, and detailed statement and account of said transactions between plaintiff and defendant being set forth in the amended and substituted petition herein (*R., 1–57*) and admitted by defendant (R., 58, 62).

Although there was no contract between the parties in respect of the payment of interest on overdrafts (*R., 63, 87*, 127, 140), the defendant was in the habit monthly of charging against plaintiff as a debit the amount of ten (10) per cent. per annum upon all overdrafts during the preceding month, and in these computations reckoned the month as thirty days instead of the calendar month, thus exacting

and charging upon overdrafts an average rate of interest of 10.22 per cent., whereas the legal rate of interest upon such overdrafts was but six (6) per cent. (R., 140); that said charges of interest upon overdrafts were carried into the notes above referred to as given from time to time, and that these transactions so continued down to June 17, 1900 (R., 128, 131, 140), although, as found and held below, the said several notes did not themselves *otherwise* draw illegal interest (R., 128, 131, 140).

The record further discloses that upon June 17, 1890, the said several transactions amounting at that time to an indebtedness from plaintiff to defendant in the sum of $64,040.38, which amount included said illegal charges of interest upon overdrafts, as well also interest upon said illegal interest charges as the same had from time to time entered into the various renewal notes, respectively, as a part of the principal thereof, a certain contract and agreement (R., 60, 61) was entered into between said parties, by the terms and provisions of which said several notes then held by the bank and representing the indebtedness and interest thereon, as aforesaid, were surrendered and delivered to plaintiff, and in lieu thereof, but representing the same indebtedness, plaintiff executed and delivered to the defendant one hundred (100) bonds, each dated March 15, 1890, of the par value of $1,000 each, and payable, at the option of plaintiff, at any time after five years from said date, but otherwise maturing on January 1, 1900, with interest thereon at the rate of seven (7) per cent. per annum, payable semi-annually, represented by interest coupons thereto attached (R., 103–107), payment whereof was secured by a certain mortgage, bearing even date with said bonds, upon certain lands of plaintiff situate in Woodbury and Plymouth counties, Iowa (R., 63, 112–119).

By the terms of the agreement aforesaid thirty-nine (39) of said bonds were to be sold at not less than par and the proceeds applied to the payment of certain prior liens and

incumbrances upon said mortgaged premises; sixty-one (61) of said bonds were to become the property of defendant, in lieu of plaintiff's notes, to the amount and for par value of said sixty-one (61) bonds, to wit, $61,000, and for the balance then appearing due plaintiff executed and delivered his promissory note to defendant for $3,040.30, payable on or before six months from June 17, 1890, with interest at eight (8) per cent. (R., 61, 124).

Default having been made in the interest upon these bonds, defendant caused proceedings to be commenced April 27, 1892, in the State court for the foreclosure of said mortgage and the collection of said bonds and interest thereon, and also instituted in said State court an action at law upon said promissory note for $3,040.30, said two causes, by stipulation, being consolidated (R., 107–124) and final decree was thereafter entered therein against plaintiff in the sum of $94,578.90 and costs as therein taxed, and directing a sale of the mortgaged premises (R., 121–123).

The court below, in this case, found and held that of said amount of $94,578.90, so adjudged and decreed in said foreclosure suit as above, $49,070.47 was *principal*, $30,988.52 was interest, and the remaining $14,519.91 was the amount paid by plaintiff in *that* action on prior liens, taxes, and interest on same (R., 110, 111, 128, 129).

The mortgaged property was sold in execution of said decree March 19, May 19, and July 2, 1894, and said sales realized the sum of $87,699.15, which was received by defendant, leaving a deficiency judgment and decree therein against this plaintiff in the sum of $11,141.50 (R., 129).

Before passing to a consideration of the judgment here under review, it is proper, in order that the exact application of the moneys realized from the sales so had in the foreclosure proceedings may be clearly understood, to briefly refer to the record from which such application, as well the several amounts thereof, appear.

It seems that in said foreclosure suit the defendant therein alleged, in substance, that certain illegal charges of interest had been made upon overdrafts, and he accordingly prayed that the amount thereof, when ascertained, be deducted from any claimed liability against him (R., 120).

It was thereupon ascertained that the original amount of such excessive interest upon overdrafts was $2,064 (R., 64, 97, 99, 124, 128, 140), and accordingly, in entering the final decree in said foreclosure suit, credit was given defendant therein for said amount of $2,064, together with interest thereon, computed the same as on the bonds—that is, at the rate of seven (7) per cent. from March 15, 1890, to the entering of said decree, the same amounting to $575.46, thus making a total credit so given therein, on account of said illegal interest, of $2,609.46 (*id.*).

In figuring the total amount of said charges of illegal interest upon overdrafts at $2,064, as above, each item and charge, as first and originally made, so entering into and forming said total, was treated as a completed transaction, whereas, beginning with the first of such charges, the same successively and continuously thereafter went into and formed part of, as principal, the various renewal notes, and were thus charged in, and interest thereon compounded from month to month until the delivery of said bonds on March 15, 1890, and from that date to the entry of final decree in the foreclosure suit, December 23, 1893, it continued to draw interest as a part of the principal so included in said bonds (*id.*, also R., 75).

It was established in this suit that in said several transactions, renewal notes, and bonds the total amount of *interest* charged plaintiff by defendant was as follows:

(*a.*) Total interest charged, including interest upon overdrafts and the compounding thereof, down to March 15, 1890, the date of the agreement above referred to		$14,969.95
(*b.*) Interest at seven (7) per cent. on sixty-one (61) bonds from March 15, 1890, to date of decree, December 23, 1893		17,689.29
(*c.*) Interest on said promissory note for $3,040.38 at eight (8) per cent. from March 15, 1890, to December 23, 1893, and interest at eight (8) per cent. on delinquent interest		938.78
Total interest charged		$33,598.02
Amount interest deducted, as above		2,609.46
Total *interest* included in foreclosure decree		$30,988.56
The entire decree therein was for		$94,578.90
Deducting therefrom said interest		30,988.56
		$63,590.34
Also the amount paid by the plaintiff therein on prior liens, taxes, and interest on same		14,519.91
Leaves as *principal* in said decree		$49,070.43

(*R., 74, 128, 129.*)

Under the several sales in foreclosure, as above, there was realized and applied in satisfaction of said decree the sum of		$87,699.15
Thus paying off in full the *said* principal amount	$49,070.43	
Also said prior liens, taxes, and interest on same	14,519.91	
		63,590.34
Leaving as the amount applied on the interest included in said decree		$24,108.81

(*R., 129.*)

PLEADINGS.

1. This action was commenced on March 8, 1895, by the giving of notice and filing of petition, in pursuance of law, the said time of commencement thereof being *within* two years from the entry of said final decree of foreclosure (December 23, 1893; R., 121), as well, also, *within* two years of the several sales made thereunder (March 19, May 19, and July 2, 1894; R., 129), from which the proceeds above referred to were realized and applied (R., 129).

An amended and substituted petition was filed September 18, 1895 (R., 1–57), in which plaintiff prayed judgment against defendant for twice the amount of the interest paid defendant, as authorized under said section 5198, *supra;* although, as appears from the record herein, as well from the foregoing, the amount claimed in said petition appears to be in excess of the exact amount established by the proofs.

2. The answer of defendant was, in substance:

(1.) A denial that the plaintiff had paid usurious interest as alleged.

(2.) That all sums charged by defendant against plaintiff for interest or otherwise were merged in the issue of the bonds June 17, 1890, whereby the plaintiff paid defendant all sums charged for interest or otherwise, and that inasmuch as this suit was not brought within two years after said 17th day of June, 1890, it was barred by the limitation of section 5198 of the Revised Statutes.

(3.) That in the foreclosure suit a full accounting was had between the parties after plaintiff herein had set up in defense his claim to illegal interest in connection with said transactions, and that plaintiff herein is therefore bound by the decree in said foreclosure suit and is estopped thereby (*R., 57–60*).

Upon issue joined the cause went to a referee; testimony before such referee was taken (R., 61–127); report of referee was made to the court (R., 127–129); said report, after exceptions filed, was approved by the trial court (R., 130, 131), and that judgment, upon appeal, was *affirmed* by the supreme court of the State (R., 142).

The supreme court of the State, in disposing of the case, held and decided as follows:

1. That in the transactions complained of the defendant charged plaintiff as interest a rate greater than that allowed by the laws of the State; but that, nevertheless, plaintiff could not recover in the present suit, because:

2. The action not being one to forfeit the entire interest, but a suit to recover back said interest, with penalty, under section 5198 of the Revised Statutes, it was incumbent upon the plaintiff to show that said interest had been paid; that if such interest was paid by the delivery of the bonds June 17, 1890, then the action is barred because not commenced within two years from the date of that transaction, and, further, that interest upon the overdrafts was not paid by the sale of the land because such interest was not included in the decree.

3. Plaintiff is barred in respect of the matters in controversy by the decree in the forecloure suit as a prior adjudication.

To review the foregoing judgment, plaintiff brought the case to this court upon writ of error (R., 147).

ASSIGNMENTS OF ERROR.

The assignments of error intended to be relied on by plaintiff in error herein are set forth in the printed record (R., 143–146), and therefore, without here repeating and reprinting the same, the attention of the court is respectfully asked to the printed record, as above.

BRIEF.

Several well-settled propositions lie at the foundation of the inquiry.

1. Section 5198 of the Revised Statutes contemplates two classes of cases:

(*a.*) Where a greater rate of interest than that allowed by law has been *charged* or *agreed* to be paid, but not in fact paid, at the time of suit, in which cases, upon defense made on ground of usury, there is a *forfeiture* of the *entire* interest which the evidence of debt carries with it. In such cases, however, the penalty provided by the last clause of said section cannot be set off against the original debt; and

(*b.*) Where the illegal interest has in fact been *paid*, in which cases double the amount of such interest may be recovered by the person so paying the same by way of penalty under the last clause of section 5198.

The distinction between the two classes of cases above mentioned is defined in—

First National Bank *vs.* Stauffer, 1 F. R., 187;
Farmers', etc., Bank *vs.* Hoagland, 7 *id.*, 159;
Danforth *vs.* National Bank, etc., 48 *id.*, 271;
Cox *vs.* Beck, 83 *id.*, 269;
Barnet *vs.* National Bank, 98 U. S., 555;
Stark *vs.* National Bank, 104 *id.*, 52;
Brown *vs.* Marion National Bank, 169 *id.*, 416; and
Haseltine *vs.* Central National, etc., decided Oct. term, 1901, December 2, 1901.

2. In respect of both classes of cases, if usury enters into the original transaction, or subsequent transactions of a similar nature, it affects all consecutive securities, however remote, growing out of such transaction; neither the renewals

of old nor the substitution of new securities can efface the usury, and the infirmity pervades the entire transaction to its close.

Campbell *vs.* McHarg, 9 Iowa, 354;
Smith *vs.* Cooper, *id.*, 376;
Garth *vs.* Cooper, 12 *id.*, 364;
National Bank *vs.* Stauffer, 1 F. R., 187;
Farmers', etc. *vs.* Bank of Hoagland, 7 *id.*, 159;
Danforth *et al. vs.* Bank, etc., 48 *id.*, 271, and
Brown *vs.* Marion Nat'l Bank, 169 U. S., 416.

3. As the indebtedness of plaintiff was to a national bank, the definition of usury and the penalties affixed thereto are to be determined by sections 5197 and 5198 of the Revised Statutes of the United States, and not by the laws of the State of Iowa.

Farmers', etc., National Bank *vs.* Dearing, 91 U. S., 29, and
Haseltine *vs.* Central Nat'l Bank, *supra.*

The laws of the State can, in this connection, be consulted only for the purpose of ascertaining the rate of interest permissible thereunder in transactions within the State, and thus fixing the rate adopted by the Federal statute.

4. Under this Federal legislation the penalty recoverable is *twice* the amount of the *entire interest* paid, not twice the excess of interest paid over the legal rate.

Crocker *vs.* National Bank, 4 Dill., 358;
National Bank *vs.* Davis, 8 Biss., 100;
Bank *vs.* Moore, 2 Bond, 175;
Brown *vs.* Bank, 72 Pa. St., 211;
Overholt *vs.* National Bank, etc., 82 Pa. St., 490;
National Bank *vs.* Karmony, 98 *id.*, 65;
Trust Co. *vs.* Nat'l Bank, 87 F. R., 143, and
Trust Co. *vs.* Nat'l Bank, 102 *id.*, 442.

The precise question involved in the above proposition does not appear to have been directly passed upon by this court, or involved, in any of the many decisions rendered under the said sections of the Revised Statutes of the United States, although the reasoning of the court in such decisions seems to clearly indicate that it was by the court contemplated that the exact measure of damages contemplated and intended under the penalty clause of said section 5198 is as above stated.

The precise question has, however, arisen, not only in the State, but in the district and circuit courts of the United States, as above, and has been there determined as herein claimed.

Counsel here invite the attention of the court to brief extracts from a few of said decisions:

In Crocker *vs.* National Bank, *supra* (opinion by Dillon, circuit judge), it was held:

"The amount of recovery is twice the full amount of interest paid, and is not limited to twice the excess of interest paid over the legal rate."

In National Bank, etc. *vs.* Davis, *supra* (opinion by Gresham, circuit judge), it was held:

"In an independent action of debt, he may recover from the bank double the amount of the entire interest thus paid."

In Overholt *vs.* National Bank, etc., *supra* (opinion by Sharswood, J.), it was held:

"It is clear then as to the national banks that whenever they charge or stipulate for the illegal rate, all payment of interest and not merely the excess is illegal."

In National Bank, etc. *vs.* Karmony, *supra* (opinion by Trunkey, J.), it was held:

"In such suit the plaintiff may recover twice the entire amount of interest paid."

In the opinion in the last above mentioned case, in referring to the particular matter here under consideration, it was stated:

"It is urged that the court erred in refusing the defendant's point that no more can be recovered than twice the amount of the interest paid in excess of the lawful rate. The statute makes the receiving or charging 'a rate of interest greater than is allowed,' a forfeiture of the entire interest.' 'In case the greater rate of interest has been paid,' the debtor may recover back 'twice the amount of interest thus paid.' The bank may take or charge the 'rate' allowed by the laws of the State where it is located, and if no 'rate' is fixed by said laws, it may take or charge a 'rate' not exceeding 7 per cent. It is clear the word 'rate' is used in the same sense throughout. The lawful rate, measure, is certain, and a greater rate, whatever it may be, is a fixed measure by agreement of the parties. The entire interest forfeited is just the rate which was contracted. Upon payment and receipt of a greater rate than is lawful, twice the amount thus paid is twice the rate, twice the entire interest. To say that the meaning is only a part of said greater rate, only the excess over the lawful rate, may be taken to measure the penalty is a wrestling of the words. The defendant recites and relies on the case of Hintermeister *vs.* First Nat'l Bnk. of Chittinago, 3 Hun. 345, where it was decided that only twice the amount paid in excess of the lawful interest can be recovered. Great weight is justly given to the decision of that court, but in this case we think its reasoning and conclusion are directly at variance with the statute. We adopt the rule of Dillon, circuit judge of the United States, that the amount of the recovery is twice the full amount of interest paid, and is not limited to twice the excess of interest paid over the legal rate. Crocker *vs.* First Nat'l Bnk. of Chetapo, 3 Cent. L. J. 527; 1 Nat. Bank Cas. 317."

In Louisville Trust Co. *vs.* Ky. Nat'l Bank (*87 F. R., 143*), circuit court for the district of Kentucky, the court, by Barr, district judge, said:

"The remaining question which is to be argued by counsel is whether or not the recovery shall be double the amount

of the interest paid or only double the amount of the usury paid. This question is not raised by the demurrer, and could not be raised, unless it would leave the amount less than the jurisdictional sum. Still, it has been argued by counsel very elaborately, and we should, perhaps, indicate our view upon it. We think the case of Brown *vs.* Bank, read with the case of McBroom, is also decisive of this question, because it would be a most extraordinary construction of this statute to allow a forfeiture of all of the interest, not only of the remaining note, but all of the interest which accrued on previous renewals, when usury had not been paid, but only allow double the usury (double the amount of the excess of interest) to be recovered when the usury and the debt had actually been paid. It is quite evident from the entire section that the penalty is to be greater when the creditor has actually required the usury, and received it, than when it was merely agreed to be paid in the obligation, though not paid. The language of the section, fairly construed, we think makes it clear that the recovery should be double the amount of the interest, and not only the excess of the interest paid. We do not think it necessary to review the authorities upon this subject, but will refer to the following: Hill *vs.* Bank, 15 Fed., 432; Bank *vs.* Davis, 8 Biss., 100; Fed. Cas. No. 10038; Bank *vs.* Moore, 2 Bond, 175; Fed. Cas. No. 10041; Crocker *vs.* Bank, 4 Dill., 358; Fed. Cas. No. 3397."

In Louisville Trust Company *vs.* Kentucky Nat'l Bank (102 F. R., 442), which was the case last hereinbefore referred to, again heard in the circuit court of the district of Kentucky, the court, by Evans, district judge, upon this question, said:

"When this case was before the court on a previous occasion, my learned predecessor, Judge Barr, in disposing of the demurrer to the plaintiff's petition, announced, as reported in 87 Fed., 143, three propositions in substance as follows:

* * * * * * *

"Second. That the plaintiff might under that section recover twice the amount of the entire interest paid and was

not limited merely to twice the amount of the excess of interest over the legal rate; and,

"Third. That usurious interest on a note is not paid so as to set running the statute of limitations against an action to recover it back by giving a renewal note which includes the interest, but that the statute only begins to run from the time the renewal note is paid. To the last two propositions we think there can be no valid objection."

In order that the court may have the benefit of all the prior adjudicated cases involving a determination of this question, either for or against the position here asserted, counsel have made a careful examination thereof, and the only decision found, in either State or Federal cases, adverse to the above contention, is that of Hintermeister *vs.* First National Bank, etc. (3 Hun., 345; 64 N. Y., 212), referred to by the court, but not approved, in the case of National Bank, &c., *vs.* Karmony, *supra.*

In said Hintermeister case, however, the court, Allen, J., in its opinion, stated that the language of said section 5198, in the penalty clause, was not clear or free from doubt as to whether it meant twice the *entire* interest or only the excessive; but in view of a supposed tenderness on the part of the United States toward its national banking institutions, the court inclined to apply the less rigorous measure of damage for the violation of the section, and thus held:

"With great hesitation, I incline to favor this interpretation of the penal clause under consideration."

The only other reference counsel have discovered, cited as opposed to the position here contended for, is Brown *vs.* Second National Bank (72 Pa. St., 209). An examination of the decision in that case, however, will show that the point was not involved in the case and was not, in fact, decided by the court.

This is made further apparent in the later case, decided in the same court, Overholt *vs.* National Bank, etc. (*supra*),

in which said Brown case had evidently been urged as authority to the contrary; but the court, declining to accept such construction of the section in question, added that the question was not before the court, and was not decided in said Brown case (*supra*).

It is thus seen that the decisions in the Federal courts are uniform in respect of this question, as are also those of the State courts, with the single exception of the Hintermeister case (*supra*), which single adverse decision was reached by the court "with great hesitation," and moved thereunto by a supposed tenderness on the part of the United States toward its national banks.

Bearing the foregoing apparently well-settled principles in mind, we think the questions at bar are not difficult of solution.

From the foregoing considerations applied to the facts established by the record and set forth in the opening statement, we think it is clearly established that plaintiff was entitled to recover against defendant, by way of penalty under said section 5198, at least twice the sum of $24,108.81 (*supra*). This amount, at the lowest calculation, was the sum of the illegally tainted interest *paid* by the satisfaction, in part, of the decree in foreclosure. This being so, plaintiff would seem to be clearly entitled, under the authorities above cited, to the recovery of twice the sum as penalty.

This remedy has been denied plaintiff by the court below upon conclusions of law which are believed to be unfounded and which call for reversal by this court.

Without marshaling these supposed errors of the court below by specific reference to the several assignments of error, we think the time of the court may be saved by noticing such of said rulings as are deemed necessary in the following manner:

The court below expressly found that in the transactions complained of defendant charged plaintiff as *interest* a rate

greater than that allowed by the laws of the State (R., 140), but that, nevertheless, plaintiff could not recover for the reasons now to be noticed.

I. Because the plaintiff had not shown that the interest, in respect of which recovery is sought, had been *paid*.

II. Even if the record shows such payment, yet plaintiff is nevertheless *estopped* to recover double the amount thereof, because of the decree in the foreclosure suit.

III. In any event, plaintiff is *barred* because the pending suit was not commenced within two years of the date of the delivery of the bonds on June 17, 1890.

I.

PAYMENT OF THE INTEREST.

It is contended by plaintiff that, under the several foreclosure sales above noted, the *principal* amount of all legal indebtedness was paid in full, and that there was further paid on account of interest the sum of $24,108.81, notwithstanding said legal principal had lost its interest-bearing power by reason of the charging of illegal interest, and which latter affected and tainted the remaining interest with which it was included. We do not understand that the general proposition that a satisfaction by sale under foreclosure decree is a payment of the debt secured is controverted in the case at bar, and, if it were, the proposition is too plain to need citation of authorities.

The defendant, however, contends, and the court below sustained the contention, that because in said foreclosure suit a part of such illegal or excessive interest was deducted and excluded by the court before entering its decree, the illegal interest in respect to which this suit is brought has *not* been paid.

This last-mentioned proposition will be further noticed and discussed under the next proposition.

II.

EFFECT OF THE FORECLOSURE DECREE.

In order to a proper understanding of the scope and effect of the proceedings in foreclosure had in the State court, as well the only measure of relief that could be invoked or afforded under the State laws, it is necessary to first inquire as to the laws of the State relating to usury.

The transactions here involved arose in 1886 and continued in various forms, such as overdrafts, notes, renewal notes, etc., until June 17, 1890, when the same became merged in the certain bonds and one note above referred to, and which latter were put in suit by the bank, in March, 1892 (R., 107–112), and in decree, December 23, 1893, (R., 121–123).

The Code of Iowa (revision of 1873), in respect of usury (the provisions of which, in that regard, were not changed until the passage of the amendatory act which took effect July 4, 1890, and below noted), contained the following:

"SECTION 2079. No person shall, directly or indirectly, receive in money, goods or things in action, or in any other manner, any greater sum or value for the loan of money, or upon contract founded upon any bargain, sale, or loan of real or personal property, than is in this chapter prescribed.

"SECTION 2080. If it shall be ascertained in any suit brought on any contract that a rate of interest has been contracted for greater than is authorized by this chapter, either directly or indirectly, in money or property, the same shall work a forfeiture of ten cents on the hundred by the year upon the amount of such contract, to the school fund of the county in which the suit is brought, and the plaintiff shall have judgment for the principal sum without either interest or cost. The court in which said suit is prosecuted shall enter judgment for the amount of interest forfeited as aforesaid against the defendant, in favor of the State of Iowa for the use of the school fund of said county, whether the said

suit is contested or not; and in no case where unlawful interest is contracted for shall the plaintiff have judgment for more than the principal sum, whether the unlawful interest be incorporated with the principal or not."

These sections, as amended by the act taking effect July 4, 1890, were incorporated in the revision of the Code of Iowa, 1897, as follows:

"SECTION 3040. No person shall directly or indirectly receive in money or in any other thing or in any manner any greater sum or value for the loan of money or upon contract upon any sale or loan of real or personal property, than is in this chapter prescribed.

"SECTION 3041. If it shall be ascertained in any action brought on any contract that the rate of interest has been contracted for directly or indirectly in money or in property greater than is authorized by this chapter, the same shall work a forfeiture of eight cents on the hundred by the year upon the amount of the principal remaining unpaid upon such contract at the time judgment is rendered thereon, and the court shall enter final judgment in favor of the plaintiff and against the defendant for the principal sum so remaining unpaid without costs, and also against the defendant and in favor of the State for the use of the school fund of the county in which the action was brought, for the amount of the forfeiture; and in no case where unlawful interest is contracted for shall the plaintiff have judgment for more than the principal sum, whether the unlawful interest be incorporated or not."

The foregoing being the State law touching usury at the time of the institution of said proceedings in foreclosure in March, 1892, this plaintiff, as defendant therein, filed answer thereto, but subsequently, in October, 1893, filed amended answer alleging, in substance, that in the transactions represented by the bonds in suit illegal interest had been charged; that the same was not known by him at the time of filing his original answer, nor until the taking of testimony in the case; and his said answer concluded:

"Wherefore, defendant asks that an accounting may be had thereof, and that plaintiff and said parties be required to render an account thereof, showing what amount or amounts have been charged for interest from time to time, and how computed, and the amount, and that the amount of said overcharges of every kind be allowed defendant and be deducted from any alleged or claimed liability herein" (R., 120).

It is to be here noted that under the laws of Iowa, above quoted, it was forbidden any person to receive any greater sum or value for the loan of money than therein provided; and, further, when such greater sum was *contracted* for a penalty was prescribed punishing both creditor and debtor, the former being permitted to recover only the *principal* indebtedness, without costs, and the debtor being subjected to a further judgment in favor of the State for the use of the school fund of the county, etc., in the amount prescribed.

In the foreclosure suit, however, it appeared (and is so found in this case below) that, while illegal interest was charged by defendant bank, it was not done by virtue of any *contract;* hence the provisions in respect of judgment in favor of the State for the use of the school fund of the county under said sections of the law could not have applied.

The result, therefore, was that, the laws of Iowa having made it illegal to receive a sum greater than that prescribed by way of interest, no greater sum than as so authorized could lawfully be recovered; and so in said foreclosure suit the court undertook to exclude that part of the interest which it deemed excessive and illegal (although, as above shown, it even then only excluded and deducted a part thereof) and entered decree for the prescribed and remaining interest.

The procedure under the above-quoted State law in cases where the usurious interest had been *contracted for*, and there

was thus an ensuing forfeiture in favor of the school fund, is shown in—

Lombard *vs.* Gregory *et al.*, 81 Iowa, 569.

And the procedure under said law in the case of usurious interest retained, though *not* contracted for, and where the result is to prevent the plaintiff from recovering such illegal interest, although not forfeited to the State, is illustrated in—

Sexton *vs.* Murdock, 36 Iowa, 516.

In connection with the foreclosure suit it is obvious that there can be no application whatever of *locus penitentiæ* for the plaintiff therein. The plaintiff instituted suit to foreclose the mortgage for the entire amount of principal and interest, including in the latter the amount charged in excess of that allowed by the laws of the State. The record shows that this claim was persisted in down to the date of the judgment. If, in a case like the foreclosure suit, the doctrine in question could ever have been applied, it is entirely clear that the day of grace had finally and forever passed at the date of the rendition of the decree therein fixing the amount of indebtedness, foreclosing the mortgage, and decreeing the sale of the property.

In McBroom *vs.* The Scottish Investment Company (153 U. S., 318, 328, 329) this court, speaking to this question, in connection with a statute of limitations, quotes, with approval, the following language from the case of Duncan *vs.* The First National Bank, etc. (U. S. D. C., west. dist. of Penn.), Thompson's National Bank Cases, 360, 362:

"From the origin of the loan, from the retaining of the first discount through all the renewals up to the time of final payment of the principal or up to the time of entering judgment, there is a *locus penitentiæ* for the party taking the excessive interest. Any time till then he may consider the excessive interest paid on account of the loan, and so apply

it and lessen the principal. * * * Up to that time he may take this election. When payment is actually made or judgment entered, the election is made, and if, as in these cases, judgment is entered for the face amount of the notes or full amount of the loan, or payment is taken in full without any reduction by taking out the excessive interest, the cause of action is complete."

And in Kirkpatrick *vs.* Houston, 4 Watts & Serg., 115, Chief Justice Gibson, speaking for the supreme court of Pennsylvania upon this subject, said:

"But even in our case the lender subsequently sued out execution for the whole, which equally evidenced a determination to insist upon the usurious part; had he meant to take only what was legally demandable, he would have better signified it by remitting the excess and although he did so at the return of the execution, it was then too late. He had sinned away his day of grace, the offence was committed and the act could not be recalled."

It is also entirely clear that the court in the foreclosure suit correctly understood the proceeding as being one of the class of cases in which, without any contract therefor, illegal interest was included in the plaintiff's claim, and that the same, without, however, any forfeiture or penalty whatever, in favor of the school fund, should, because of such illegality alone, be excluded from the decree. The decree itself (R., 121) does not upon its face show any exclusion of illegal interest whatever; but the plaintiff in error introduced oral testimony in the case at bar, showing the nature of the proceedings before the foreclosure court and the action of the court in the exclusion from the decree of the sum hereinbefore mentioned. Among the witnesses so called was the Hon. F. R. Gaynor, judge of said court at the date of the foreclosure trial, who testified (R., 96, 97) as follows:

"A. My recollection of the conclusion of the court upon that issue is that there was no agreement for the payment of interest beyond the legal interest, such as could be en-

forced by law, and that therefore the statute against usury would not apply; but, as a matter of fact, there was included in the things sought to be foreclosed, excessive interest, and my recollection is that this interest was figured on overdrafts, and it was ordered in making the decree that this excessive interest be deducted from the amount for which judgment should be ultimately entered, and I think it was at that time entered only for the amount that was found due after deducting this excessive interest, or this charge of interest upon overdrafts."

And upon cross-examination, also as follows:

"Q. If I understand you rightly, Judge, you found specifically that there was no agreement for a usurious rate?
"A. According to my finding, no."

From the foregoing it is obvious that the foreclosure proceeding did not involve, either as a matter of pleading or evidence, any question of penalty or forfeiture, even under the laws of the State, and that the decision of no such question entered into the decree rendered. The answer of the defendant simply formed the basis for an inquiry which developed the fact that the bank, without contract with the defendant, had charged a greater rate of interest than was allowed by the laws of the State, and, although such excessive interest could not be adjudged to the State for the benefit of the school fund, because not taken under contract, yet that nevertheless such illegal interest should be excluded from the recovery as prohibited by the State statute. To put this conclusion into effect, the court determined that a certain specific sum, to wit, $2,064, with interest at the rate named in the bonds—making a total of $2,609.46—should be deducted from the total amount of the decree. Just exactly how this amount was reached in the judicial mind is not clear from the record in the foreclosure suit. As explained, however, by the somewhat unusual testimony in the case at bar (Asa F. Call, 95, 96; F. R. Gaynor, 96, 97; S. M. Marsh, 99), it would appear that

after the ruling by the court (*supra*) to the effect that the overcharge of interest should be excluded, the matter was referred to counsel to frame a decree as to figures, and that the paper so prepared subsequently became the decree of the court. As hereinbefore noted, however, the amount deducted was simply the aggregate of the monthly computations of interest upon overdrafts, with interest thereon at the rate mentioned in the bonds (Report of Referee, p. 128).

This exclusion by the district court of Iowa of the amount of $2,609.46 from the sum found due in the foreclosure suit was obviously and manifestly not the relief extended to the borrower by section 5198 of the Revised Statutes of the United States. It did not even partake of the nature of the relief so extended.

This section of the Revised Statutes provides, for the benefit of the borrower and by way of punishment upon the national bank which exacts usurious interest, two separate and independent methods of relief: First, where the illegal interest has not been paid and suit is brought to enforce the obligation, a forfeiture against the bank of all the interest carried by the evidence of debt; second, where the illegal interest has been paid, the right on the part of the borrower to recover against the bank in an action of debt and in the nature of a penalty twice the amount of the interest paid.

We have already, in a preceding portion of this brief, fully and conclusively shown by reference to the authorities:

(*a.*) That the penalty suit provided for by the last clause of section 5198 can only be commenced when payment of the interest has occurred. To this effect, among other cases cited, are:

First National Bank *vs.* Stauffer, 1 F. R., 187, 189.
Cox *vs.* Beck, 83 F. R.. 269, 274.
Barnet *vs.* National Bank, 98 U. S., 555, 558.
Hazeltine *vs.* Bank, Oct. term, 1891; Dec. 2, 1901.

(*b.*) That payment of illegal interest entitling the borrower to recover under the penalty clause of the section is made by the foreclosure of a mortgage executed to secure the obligation, the sale of the property foreclosed, and the appropriation of the proceeds thereof to the satisfaction of said debt, with interest. This general proposition is not controverted in the case at bar.

(*c.*) That the remedy by way of penalty prescribed by section 5198 cannot be used by way of set-off by the defendant in a suit by the bank upon the evidence of debt, but that such penalty can only be enforced by a separate and independent suit—that is to say, that in a case where the greater rate of interest has been paid and the borrower has been made defendant in an act to recover principal and interest no method is open to him by which, in that suit, he can take advantage of the penalty clause of the section, his only recourse, in that regard, being a separate proceeding by action in the nature of debt.

Barnet *vs.* National Bank, 98 U. S., 555, 559.
Haseltine *vs.* Bank, *supra.*

It necessarily follows, upon consideration of the above-stated propositions and authorities, that the decree of the district court of the State of Iowa in the foreclosure suit in respect to the penalty here sought to be enforced is not an estoppel or a bar upon the plaintiff in error for the following conclusive reasons:

First. The issue, question, or matter involved in the foreclosure suit, as determined by the pleadings and decree, is not the same issue, question, or matter presented in the case at bar. As we have already shown, the only question which, in this regard, under the laws of the State of Iowa, could have arisen in the foreclosure suit, and the only question which, as matter of fact, did therein arise and was therein decided, was whether, in the absence of any contract providing therefor, illegal interest in an amount less and in

character different from that covered by the penalty clause of the Federal statute could be recovered by the plaintiff; that was the sole and only question in this regard raised by the pleadings, illustrated by the evidence, or passed upon by the court in its decree. In the case at bar the question presented is whether, under the penalty clause of section 5198 of the Revised Statutes, the plaintiff can recover from the defendant twice the amount of the *entire* interest paid as the result of the foreclosure suit, in which entire interest there is included a greater amount than is allowed by law, such excessive interest not being the same aggregate sum or even of the same character as that involved in or passed upon in the foreclosure suit. In other words, the question presented to and decided by the district court in the foreclosure suit was an entirely different question from that here presented. It arose under different laws and related to a different matter or claim; and the decree of the court did not, by the utmost latitude of construction or as explained by the parole evidence in the case at bar, purport to decide any question connected with the right of the plaintiff at bar to pursue his remedy under the penal clause of section 5198.

Under these circumstances, and upon these considerations alone, we submit that there can be no such result as estoppel or bar in the present case.

It is well settled by abundant authority that the doctrine of *res adjudicata* does not apply except in cases where the same issue is present in both suits, and where in the former suit that issue was not only presented but passed into judgment. In other words, there must have been in the prior suit an identical issue, which after trial was considered by the court and the finding of the court thereon passed into final judgment.

Wells on *Res Adjudicata*, secs. 282, 295.

Am. & Eng. Encyl. of Law, vol. 21, p. 221 and cases cited.

Cromwell *vs.* County of Sac, 94 U. S., 351, 353.

In Cromwell *vs.* County of Sac (*supra*), Mr. Justice Field, speaking for this court, at page 353, upon this question said:

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

Second. A further and conclusive reason why the decree in the foreclosure suit is not an estoppel or bar upon the plaintiff is that the law prohibited him in such prior suit from seeking to assert the remedy here invoked. Under such circumstances it is impossible that he could have been concluded by the decree therein.

It will be borne in mind, as shown by the preceding authorities, that no right of action whatever arose under the Federal statute until payment of the illegal interest which entered into the transaction. That payment was not made until the conclusion of the foreclosure suit and the satisfaction, in part, of the decree, by the sale of the premises mortgaged and the appropriation of the proceeds of such sale in full satisfaction of the debt and in part satisfaction of said interest. The plaintiff in error was not, therefore, at any stage of the proceedings in said foreclosure suit, in a position where he was entitled by law to in any way present the question of penalty now arising under section 5198. Viewed from the standpoint of the question of payment alone, there was no possible way by which the question which now arises in this case could have been presented to or have been determined by the district court of Iowa in the foreclosure suit.

Upon this consideration alone, it is apparent that the decree entered in such foreclosure suit cannot here be binding.

Even if this had been otherwise and the illegal interest, prior to the termination of the foreclosure suit, had been paid, yet, under the law, as settled by the decisions of the inferior courts and of this court, the amount to which the defendant would have been entitled by way of penalty could not have been set off in said foreclosure suit. The decisions are absolutely conclusive of the proposition that the defendant in such suit could not have taken advantage of the remedy invoked in the case at bar, even if, as matter of fact, the illegal interest had at that time actually been paid.

Barnet *vs.* National Bank, 98 U. S., 555.

Haseltine *vs.* Bank, *supra.*

Inasmuch, therefore, as it would have been impossible, even if the interest had at that time been paid, for the defendant to have set up that claim as against the relief sought in the foreclosure suit, it must be conceded that no judgment therein could, by any possibility, bind him in the case at bar.

It may be argued that the position we have here taken might, in effect, lead to instances where, the illegal interest having been paid and the defendant having been sued upon the evidence of debt, the case might be allowed to go by default and suit be thereafter brought by the defendant against the plaintiff to recover the penalty. It may be argued that in such a case the plaintiff in such second suit has lost the right to recover by reason of failure to assert the forfeiture relief in his favor provided by the first clause of section 5198. The answer to this argument is that such could not have been the intent of Congress in the passage of the act, for otherwise the penalty provision would be rendered practically nugatory in every case where illegal interest has been paid and the bank sues upon the original obliga-

tion prior to the institution of a penalty suit by the borrower. In other words, any national bank choosing to exact and receive usurious interest could in every such case evade the penalty clause by simply bringing suit upon the original obligation, for that proceeding on the part of the bank would, according to the argument of our adversaries, carried to its logical conclusion, result in placing the borrower where he could never invoke the penalty feature of the section, but would be driven to take only the forfeiture relief afforded by the first clause of the act. National banks could thus with impunity violate the provisions of the section in respect of the charging of illegal interest, knowing that if perchance it should happen to be called to account in any individual case it could, by simply filing suit on such obligation, forfeit merely the interest, and thus escape the penalty prescribed by the second clause of the section. If the contention of the bank herein be sound, the result must be the reading into the first clause of section 5198 a provision that the forfeiture therein prescribed shall only become operative and take effect when a suit is brought upon such obligation; and also reading into the second clause of said section a provision that the penalty shall only apply to a case where a voluntary payment of illegal interest has been made and cannot apply where suit has been brought upon the obligation.

We respectfully submit that to so construe the section in question would be clearly violative of the obvious intent of Congress in fixing a penalty to prevent the commission of the prohibited act. The particular thing which Congress manifestly was attempting to prevent was the exacting charging, and receiving by national banks of illegal interest. It is utterly immaterial, so far as the object intended to be accomplished by Congress is concerned, whether the interest was received by the bank as the result of a voluntary payment by the debtor or as the result of an involuntary payment under process of a court. The thing prohibited was the

receiving of illegal interest, *in whatever form that result was accomplished;* and when actually received, regardless of the manner in which received, the offense became complete and the cause of action, under the penalty clause of the section, arose.

In this connection, it may perhaps be proper to notice the contention made in the printed brief of defendant herein (on page 4 thereof) that the referee below has found that plaintiff did not actually pay any excessive interest, but that the same had been excluded from the decree in the foreclosure suit. Counsel contends that the report of the referee, in this regard, constituted a finding of fact which, having the effect of a verdict of a jury, is here conclusive.

The answer to this contention is: First, that so far as the report of the referee contains the figures relating to the transactions in question, it is undoubtedly a finding of fact and one upon which we rely, as shown in our previous discussion of the case; second, that in so far as said report attempts to find that illegal interest was not paid in the foreclosure suit, because the particular amounts named were excepted from the decree, that finding is a conclusion of law which, in addition to being misleading, is totally incorrect, as we have already shown.

III.

STATUTE OF LIMITATIONS.

It is further objected on behalf of defendant that there can be no recovery in this case because of the finding by the referee that the usurious transactions complained of occurred more than two years prior to the commencement of the suit.

By reference to said finding of the referee, as well as to the decision of the court below, affirming the judgment against plaintiff, it will appear that such holding was based upon the assumption that the delivery of the bonds, under date of

June 17, 1890, hereinbefore particularly referred to, constituted a *payment* within the meaning of said section 5198, and that, inasmuch as this suit was not brought within two years thereafter, the cause of action was barred by the special statute of limitations contained in that section. But the court will note that this was not the finding of a mere fact sufficient to defeat the claim of plaintiff, but was in effect an erroneous construction given by the court to the statute of limitations so contained in the section, to wit, that the cause of action arose at the time of the delivery of the evidence of indebtedness, which embraced the illegal interest prohibited by the statute. As above shown, this court has repeatedly held that the cause of action does not arise, and the statute of two years' limitation is not put into operation, until the actual *payment* of such illegal interest.

Without prolonging the discussion in respect of this particular feature of the case, counsel merely call the attention of the court to some of the cases above noted, in which said rule of decision is expressly announced, viz:

McBroom *vs.* Scottish Investment Co., 153 U. S., 318.
Brown *vs.* Bank, 169 U. S., 416.

IV.

THE DECISION AGAINST PLAINTIFF IN THE COURT BELOW INVOLVED A FEDERAL QUESTION.

It is objected on the part of defendant that there is no question of law, Federal or otherwise, involved in this case, and that the questions raised are simply questions of fact. In support of that contention, defendant heretofore filed in this cause a motion to dismiss or affirm, and, in resistance of that motion, plaintiff filed brief, with the result that the motion was postponed to the hearing on the merits.

Without here repeating the considerations heretofore

reached in resistance of said motion, and set forth in a printed brief filed herein, counsel respectfully refer the court to said former printed brief.

Respectfully submitted.

JAMES K. REDINGTON,
A. A. HOEHLING, JR.,
Attorneys for Plaintiff in Error.

WASHINGTON, D. C., *January*, 1902.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 164.

DANIEL H. TALBOT, PLAINTIFF IN ERROR,

vs.

FIRST NATIONAL BANK OF SIOUX CITY, IOWA.

MOTION TO DISMISS OR AFFIRM.

Comes now the defendant herein, by Asa F. Call, its attorney, appearing in that behalf, and moves the court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because the judgment to which the writ of error is taken is the judgment of the Supreme Court of one of the United States, to-wit, the Supreme Court of the State of Iowa, and in the rendition of said judgment, and in the proceedings had prior thereto, there was not drawn in question or involved any title, right, privilege or immunity under any statute of the United States.

And the said defendant, by counsel as aforesaid, also

moves the court to affirm the said judgment to which the said writ of error has been allowed and taken, because although the record in said cause may show that it has jurisdiction in the premises, yet it is manifest that the said writ of error has been taken for delay only, and that the question on which the jurisdiction of this court depends is so frivolous as not to need argument.

Asa F Call

Atty. for Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 164.

DANIEL H. TALBOT, PLAINTIFF IN ERROR,

vs.

FIRST NATIONAL BANK OF SIOUX CITY, IOWA.

NOTICE OF SUBMISSION OF MOTION TO DISMISS OR AFFIRM.

To DANIEL H. TALBOT, *Plaintiff in Error*:—

Please take notice that on Monday, the 14th day of October, 1901, at the opening of court, or as soon thereafter as counsel can be heard, a motion to dismiss or affirm, of which the foregoing is a copy, will be submitted to the Supreme Court of the United States, for the decision of the said court thereon.

Enclosed herewith is a copy of the Brief and Argument

to be submitted with said Motion in support thereof.

Sioux City, Iowa, July 29th, 1901.

Asa F Call

Attorney for Defendant in Error.

STATE OF IOWA, }
County of Woodbury, } ss.

Asa F. Call, being first duly sworn, deposes and says, that on the 29th day of July, A.D., 1901, he deposited in the mail, in the postoffice at Sioux City, Iowa, a Motion to Dismiss or Affirm, of which the foregoing is a true copy, together with a copy of his brief and argument on behalf of the defendant, duly post paid and addressed to Mr. Daniel H. Talbot, Sioux City, Iowa, which is the proper address of said plaintiff in error, and further he saith not.

Asa F Call

Subscribed in my presence and sworn to before me this 29th day of July, A. D., 1901.

Merle Peavey

Notary Public Woodbury County, Iowa.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 164.

DANIEL H. TALBOT, PLAINTIFF IN ERROR,

vs.

FIRST NATIONAL BANK OF SIOUX CITY, IOWA.

BRIEF FOR DEFENDANT ON MOTION TO DISMISS OR AFFIRM.

STATEMENT.

This action was brought under Section 5198 of the Revised Statutes of the United States, to recover an alleged charge of usurious interest, on certain overdrafts.

The amended petition filed on the 18th day of September, 1895, sets out in detail an account with the First National Bank, consisting of checks, deposits and constantly increasing over-drafts, on which it is alleged excessive interest was charged for a period of four (4) years, running from Janu-

ary, 1886, to March, 1890, which, from time to time, were merged in notes of the plaintiff to the bank, signed by himself and certain accommodation parties, all of which were finally merged into the bonds of the plaintiff under date of March 15th, 1890, which bonds were secured by a deed of trust on the lands of the plaintiff; also alleging that a foreclosure suit was commenced on these bonds, and mortgage securing them, in the District Court of Woodbury county, Iowa, on the 3d day of March, 1892, on which judgment was rendered against the plaintiff on the 23d day of December, 1893, for the sum of ninety-four thousand five hundred seventy-eight and ninety one hundredths dollars ($94,578.90), resulting in an execution sale on the 19th day of March, 1894, under which all of plaintiff's lands were sold, thereby paying the excessive interest charged. (Record pp 1 to 57).

For answer to this petition, this defendant denied that plaintiff at any time paid any usurious interest, or that any excessive or usurious interest was included in the decree of foreclosure mentioned. That plaintiff's cause of action was barred under the provisions of the statute under which he claimed relief, an further, that his cause of action had been fully determined and adjudicated in the foreclosure suit referred to. (Record, pp 57 to 60).

The cause was referred to W. G. Sears, Esq., as referee, to find the law and facts. The referee, after hearing the evidence for both plaintiff and defendant, found the following facts:

FIRST. That the defendant is a National Bank organized and doing business under the laws of the United States, and that the plaintiff was a customer and depositor of defendant's from January 1st, 1886, to March 15th, 1890, and during

said period overdrew his bank account, and became indebted to the defendant on overdrafts as alleged in the petition.

SECOND. That monthly during said period, plaintiff's account was balanced, and the interest computed on the overdrafts at the rate of ten (10) per cent. per annum, and the interest so charged was added to plaintiff's overdraft account for the next month.

THIRD. That the defendant instructed its bookkeeper to charge plaintiff interest on his overdraft at the rate of ten (10) per cent. per annum, and that defendant in computing said interest took the aggregate amount of overdraft, approximating to the nearest hundred for said month, on a basis of thirty days to the month or three hundred and sixty days to the year, and this way of computing interest on overdrafts was defendant's universal custom and the general custom of bankers in Sioux City during said period.

FOURTH. That the total interest on plaintiff's overdrafts amounted to two thousand and sixty-four dollars ($2,064.00), and the average rate of interest charged by defendant was ten and twenty-two one hundredths (10 22-100) per cent. and the total amount of interest charged in excess of ten (10) per cent. was seventy-two ($72.00) dollars.

FIFTH. There was no contract for plaintiff to pay interest on overdrafts, and the defendant did not intend to charge him more than ten (10) per cent. per annum, and that said average rate of ten and twenty-two one hundredths (10 22-100) per cent. on overdrafts arose by computing interest on a basis of thirty days to the month, or three hundred and sixty days to the year instead of three hundred and sixty-five days to the year, and by approximating the aggregate amount of overdrafts for one day to the nearest hundred, in place of

computing on the actual aggregate amount, and without any intent to avoid the laws of Iowa relating to usury.

SIXTH. That interest on plaintiff's overdraft was included in the several notes, which did not draw excessive interest, given by plaintiff prior to March 15th, 1890, to the defendant, referred to in plaintiff's petition and admitted by the defendant; and all of the indebtedness of plaintiff to defendant, arising or growing out of said bank account from January 1st, 1886, to March 15th, 1890, was evidenced by said notes, but said notes were not given in payment of said indebtedness.

SEVENTH. That the plaintiff, for the purpose of funding his indebtedness, on March 15th, 1890, executed one hundred (100) of his negotiable bonds, payable to the Union Loan & Trust Company, or bearer, for one thousand dollars ($1000) each, secured by trust deed to the Union Loan & Trust Company, trustee, on plaintiff's land in Woodbury and Plymouth counties, state of Iowa. On June 17th, 1890, he sold defendant sixty-one (61) of said bonds, amounting to sixty-one thousand dollars ($61,000.00), and gave his note to defendant for three thousand forty dollars and thirty-eight cents ($3,040.38) in full settlement and payment of his indebtedness to this defendant.

EIGHTH. In March, 1892, the Union Loan & Trust Company, as trustee for the First National Bank, this defendant, and T. J. Stone, who is president of defendant's bank, commenced an action against this plaintiff, and others, to foreclose said trust deed and bonds, and D. H. Talbot, this plaintiff, in his answer and amendments in said case set up that excessive interest had been charged on overdrafts by the First National Bank, and said interest had been included

in the notes afterwards given, and said notes were merged in the bonds in suit, and asked that an accounting be had of the amount of excessive interest charged on said overdrafts, and that the amount so found be deducted from the amount due on the bonds; and said D. H. Talbot, in support of his allegation, introduced evidence showing the amount of interest charged on said overdrafts; and in the determination of the case the court found that excessive interest on overdrafts to the amount of two thousand and sixty-four dollars ($2,064.00) had been charged the plaintiff, and ordered that said two two thousand and sixty-four dollars ($2,064.00) with interest at the rate named in the bonds, amounting to five hundred ninety-five dollars and forty-six cents ($595.46), making a total of two thousand six hundred nine dollars and forty-six cents ($2,609.46), be deducted from the amount due on the bonds, and a decree was entered in said case for the amount due on said bonds, less said sum of two thousand six hundred nine dollars and forty-six cents ($2,609.46).

NINTH. That in said cause a decree for ninety-four thousand five hundred seventy-eight dollars and ninety cents ($94,578.90) was rendered, of which forty-nine thousand seventy dollars and forty-seven cents ($49,070.47) was principal, thirty thousand nine hundred eighty-eight dollars and fifty-two cents ($30,988.52) was interest and fourteen thousand five hundred nineteen dollars and ninety-one cents ($14,519.91) was the amount paid on prior liens, taxes and interest on same by plaintiff in that action.

TENTH. That the sheriff, under an execution issued on said decree, sold March 19th, 1894, plaintiff's property, amounting to thirty-six thousand four hundred thirty-nine dollars and fifteen cents ($36,439.15); and on May 19th, 1894,

under said execution, sold property amounting to fifty thousand and sixty dollars ($50,060), and on July 2d, 1894, sold under said execution property amounting to twelve hundred dollars ($1,200), making a total of eighty-seven thousand six hundred ninety-nine dollars and fifteen cents ($87,699.15) realized from sheriff's sale of said land under said decree, and leaving a balance, including the interest to date of sale, of eleven thousand one hundred forty-one dollars and five cents ($11,141.05) unpaid on said judgment and decree, which balance, with interest, has not been paid.

ELEVENTH. That the interest on overdrafts not having been included in said decree, was not paid by the sale of plaintiff's land under said execution.

TWELFTH. That plaintiff's overdrafts, including interest thereon, was paid June 17th, 1890, more than four (4) years before the commencement of this action.

To this report the plaintiff filed exceptions, which, being submitted, the District Court of Woodbury county, Iowa, found:

"That the conclusions contained in the report of referee are correct; that the matters in this suit were adjudicated between the parties in the former action; that plaintiff's cause of action accrued June 17th, 1890, and his suit is barred by United States statutes on which this action is based, and that plaintiff's petition should be dismissed at his costs. (Record, page 131.)

From this judgment the plaintiff appealed to the Supreme Court of Iowa, the questions submitted being:

First. Whether any illegal interest had ever been paid by the plaintiff;

Second. If paid, whether his cause of action was barred by the statute of limitations; and

Third. Whether the matters involved had been previously adjudicated in the foreclosure proceeding.

After hearing, the Supreme Court of Iowa rendered its opinion and judgment, holding that the plaintiff had never in fact paid any illegal or usurious interest, and that if such interest had been paid it was paid more than two years prior to the commencement of this suit, and was, therefore, barred under the provisions of the statute, and that the matters involved had been formerly adjudicated, the essential features of the opinion of the Supreme Court of Iowa being as follows:

"We have seen that unless the plaintiff has paid the illegal interest, he is not entitled to recover it in this action. If it may be said that the delivery of the sixty-one bonds on June 17th, 1890, was a payment, this action is barred, as it was not commenced 'within two years from the time the usurious transaction occured,' having been commenced March 8th, 1895.

"The interest on overdrafts was surely not paid by the sale of the land, for, as we have seen, it was not included in the decree. As we view the case, we think the illegal charges of interest have never been paid, and, therefore, the plaintiff is not entitled to recover in this action.

"There is some dispute as to whether plaintiff set up these charges of illegal interest in the action to foreclose the trust deed so as to constitute a former adjudication.

"That he set it up, and that it was adjudicated, we have no doubt. True, it was not set up with the same fullness and elaboration as in this case. Unquestionably it is a matter

which might have been pled in that case, and under a familiar rule the plaintiff must be held to have asserted all available defenses to that action.

"Said section 5198 provides that action to recover back illegal interest paid must be commenced 'within two years from the time the usurious transactions occurred.' Now, whether or not we call the delivery of the bonds a payment, it is evident that the usurious transactions occurred on and before June 17th, 1890, and it follows that this action is barred. These questions are so largely questions of fact and rest upon familiar and undisputed principles of law that we do not find it necessary to refer to any of the many authorities cited.

"The lower court was fully warranted in affirming the findings of fact as reported by the referee. While we do not concur in the conclusions of law that the interest on overdrafts was excessive, but not illegal or usurious, and that the custom of banks to compute interest on the commercial basis of thirty days to the month is legal; still it does not follow that the judgment of the District Court is erroneous.

"It is correct, notwithstanding the charge of illegal interest, because the plaintiff has never paid that interest, but has been allowed the full benefit of the facts in the foreclosure case and because this action was not brought within two years of the time the usurious transaction occurred."

(Record pages 141-142.)

From this judgment a writ of error was allowed by the Chief Justice of the Supreme Court of Iowa on the alleged ground that "there was drawn in question and involved and specially set up and claimed by petitioner, a title, right, privilege or immunity under the statutes of the United States, to-

wit: Under sections Nos. 5197 and 5198, of the Revised Statutes of the United States, and the decision in said judgment rendered was against the said title, right, privilege or immunity so specially set up and claimed by your petitioner."

ARGUMENT

I.

THE RECORD PRESENTS NO FEDERAL QUESTION.

Section 5197, Revised Statutes, provides that any national banking association may charge and receive the rate of interest allowed by the laws of the state; and section 5198 provides that "taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided such action is commenced within two (2) years from the time the usurious transaction occurred."

The foundation of the plaintiff's action is, therefore, the allegation that a greater rate of interest has been paid. These words, "greater rate" refer to the preceding part of the section where it is said that "the taking, reserving or charging a rate of interest greater than is allowed by the preceding section." The words, "greater rate" as contained in the penalty clause refer to a greater rate than is allowed by the laws of the state, and in order to recover it is necessary for plaintiff to allege and prove that a greater rate has been paid. If

the greater rate has not been paid there is no ground or basis for recovery under the section. This fact is the gist of the action. It is the important point to establish. It is the actual wrong that has been done, and the actual loss which the debtor has incurred which furnishes the basis for a suit. It is the only fact upon which a suit can be predicated under this section and is absolutely essential at the very threshold of the case.

The plaintiff claims that excessive and illegal interest was charged by the defendant on his overdrafts between the years 1886 and 1890, without his consent, the excess being created by the bank's custom of charging interest at the full legal rate on overdrafts on the basis of three hundred and sixty days to the year instead of three hundred and sixty-five, with monthly rests.

From time to time the plaintiff made deposits, which were applied to the reduction of this overdraft, but he does not claim that these deposits were applied to the payment of excessive or usurious interest. He does not claim to have paid any money to the defendant since March, 1890, excepting as defendant realized a portion of its judgment through the foreclosure sale of the plaintiff's property.

In order to avoid the statute of limitations the plaintiff claims that the time he actually paid usurious interest was when his property was sold in 1894, under the decree of foreclosure.

On this question of fact as to whether the plaintiff actually paid any excessive interest through the sale of his property on foreclosure, the referee found that he did not, but that, on the contrary, the District Court of Woodbury county, on the foreclosure suit, deducted two thousand six hundred nine

dollars and forty-six cents ($2,609.46), being the full amount of interest charged on the plaintiff's overdrafts, and that, therefore, no interest on overdrafts was computed in the decree. (Record, page 128.)

This finding of fact was confirmed by the District Court. (Record, page 131).

And also by the Supreme Court of Iowa. (Record, page 141).

The decision of the Supreme Court of Iowa rested largely on this proposition. Its conclusions are summed in this sentence: We think the illegal charges of interest have never been paid, and, therefore, the plaintiff is not entitled to recover in this action." (Record, page 141).

This is a question of fact which does not in any way involve the validity, construction or applicability of the section under which the action is brought. It is the primary question of fact upon which the cause of action rests, and cannot be avoided by any argument that illegal interest was charged and reserved, for this will not authorize a recovery unless, as a matter of fact, the illegal interest was actually paid.

McBroom vs. Scottish Investment Co., 153 U. S., 319.

Brown vs. Marion National Bank, 169 U. S., 416.

First National Bank vs. Denson, 22 Southern Rep., 518.

Citizens' Bank vs. Forman, 63 Southwestern Rep., 454.

The next question decided by the Supreme Court of Iowa was that there was a former adjudication inasmuch as this plaintiff had, in the foreclosure suit, set up the charges of illegal interest by way of answer, and had availed himself of the privilege conferred upon him by the statute, and had se-

cured a decree in his favor, deducting all interest upon his overdrafts.

This finding of fact is also in accord with the finding of the distaict court of Woodbury county and the finding of the referee.

This is an independent estoppel not involving any federal question, and accords with the views of this court on the question of former ajudication.

In Western Pacific Railroad vs. United States, 168 U.S., page 48, the court said: "That a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination."

The third proposition discussed by the Supreme Court of Iowa was that if there had been a payment of interest prior to the sale of plaintiff's lands under the decree, such, for instance, as by the application of the checks on his overdrafts, or by giving his notes or bonds, that such a payment would not afford ground for a suit because of the statute of limitations; not deciding, however, that the giving of a note could be considered as a payment, or that unapplied checks

on general account would be applied to illegal charges rather than to legal charges.

It was, perhaps, not necessary to decide this question, because the plaintiff has not claimed that either his checks or his notes constituted a payment of illegal interest. He has purposely avoided making this claim to escape the bar of the statute.

Nor could he so claim under the now settled rule of this court that neither unapplied checks or renewal notes can be regarded as a payment under this section of the Revised Statutes.

McBroom vs. Scottish Mortgage Co., 153 U. S. 330.

Brown vs. Marion National Bank, 169 U. S. 419.

This question as to whether the action is barred is also a question of fact not involving in any way the construction or validity of the statutes of the United States. No construction of the statutes is called for by the plaintiff's allegations; all that is necessary is to read it. No facts were alleged to create any exception to this bar, therefore, there is nothing to read into it. Something more than an abstract discussion is necessary to raise a federal question.

If the plaintiff should now claim a payment through his unapplied checks, or his notes or his bonds, and should seek to evade the bar of the statute by alleging ignorance of his cause of action, it would not avail him to evade the bar, for ignorance of a cause of action is no excuse. A person who would avoid the bar must go further and show that his ignorance is caused by the affirmative acts of the guilty party.

Pearsall vs. Smith, 149 U. S. 231-236.

Nowhere in the opinion of the supreme court of Iowa is

the validity, construction, applicability or effect of these sections of the revised statutes called in question.

This court has repeatedly held that to sustain a writ of error from this court, something more must appear than that the parties claim a right under an Act of Congress.

De Lemar's Nevada Co. vs. Nesbitt, 177 U. S. 523-527 and cases cited.

This court has also repeatedly held that in proceedings in this court to review the action of state courts, this court does not enter into consideration of questions of fact, but will accept the determination of the state courts in such matters as conclusive, and inquire simply whether there have been errors of law.

Gardner vs. Bonestell, 180 U. S. 362-370.

This court has also repeatedly held that it is not every case where a federal statute has been construed by a state court that gives a right of review to this court, but the claim of any right, title, privilege or immunity under the statute must have been denied by the state tribunal in order to give jurisdiction to review its judgment.

That a federal statute was construed unfavorably to one of the parties to a suit is no ground of jurisdiction of this court, unless such construction is not only unfavorable but is against the right, etc., specially set up and claimed under the statute.

Kizer vs. Texarkana Railway, 179 U. S. 199-201.

It has also been repeatedly held that where the decision of the state court rests on questions not federal in their character, that this court will not take jurisdiction.

Pittsburg vs. Cleveland,, 178 U. S. 270.

And also that where federal questions were involved, but the decision of the state court could be properly rested on questions not federal in their character, and the federal question was not necessary to the determination of the case, this court could not take jurisdiction.

Johnson vs. Risk, 137 U. S. 300.

Cook County vs. Calumet Co., 138 U. S. 651.

O'Neill vs. Vermont, 144 U. S. 336.

The decision of the Supreme Court of Iowa primarily turned on the question as to whether Talbot ever actually paid any excessive interest.

To ascertain and determine this all important fact, which was the first essential in Talbot's case, it was necessary for the Supreme Court of Iowa to examine the record, and consider each step in the history of the dealings of the parties.

His current deposits from 1886 to 1890 could not be considered a payment of excessive interest, because not so applied, and because neither party so intended.

The giving of renewal notes or personal bonds, which were in fact notes under a different name, has been repeatedly held not to be a payment.

The sale of his property under decree could not work a payment unless excessive interest was computed in and made a part of the judgment and decree, which the Supreme Court of Iowa finds was not done, as a matter of fact.

This finding of fact is conclusive on this Court, and ends the case.

Talbot's grievance, which he tries to state in his assignments of error, is that in the foreclosure suit against him only

the interest on his overdrafts was deducted when he was entitled to areduction of all interest.

In point of fact this claim is incorrect because the trifling items of overcharge on overdrafts was unintentional.

(Record, page 127).

But whether correct or not, it is manifest that this is not the time or the proceeding to secure a reversal of that decree; for it was entered eight years ago, and no appeal was taken. It is, therefore, final and conclusive.

It is evident from the assignments of error, that Talbot now conceives that, as he might have secured a forfeiture of all interest in the foreclosure case, that the inclusion of any interest in that decree was improper and illegal, and if illegal it can be recovered back in this action, regardless of whether the interest collected was in excess of the legal rate.

His conception of the scope of Section 5198, if his position is understood, passes reason and argument, and approaches the ridiculous.

It has not yet been held that a ridiculous and wholly unjustifiable construction of a federal statute would confer jurisdiction.

This section was not enacted as a "drag net" to right all wrongs, real and imaginary, or to afford a basis of recovery for all kinds of grievances, but only affords relief in the one case of actual payment of a greater rate of interest than the laws of the state permit.

Whether such interest has been paid so that the statute can be set in motion, is a question of fact. The validity, effectiveness and applicability of the statute is conceded if Talbot had a right to invoke its aid; but never having paid any excessive interest, he is not in position to discuss its

provisions, or call for its construction. Certainly the supreme court of Iowa has not denied its validity or attempted to place any adverse construction upon it.

Section 5198 affords a choice of remedies, but doesn't mean that a debtor may try one and then the other in the same transaction.

If he elects to try and secure a forfeiture of all interest, and has his day in court, and a determination of his controversy, it is not intended that he may try his case again in an action to collect a penalty.

In the foreclosure case Talbot defended against excessive interest, and was at least partially successful in securing a deduction of all excessive interest.

The supreme court of Iowa have decided that this was an adjudication, and a bar to this suit. They reached this conclusion from an examination of the issues and judgment in the former case.

This then is an independent estoppel not involving the validity, construction or effect of Section 5198, and does not confer jurisdiction upon this court.

II.

If it is held, however, that technically this court has jurisdiction, then it is respectfully submitted that the question presented for re-examination is so clearly without merit as not to need further argument, and that the judgment of the supreme court of Iowa should be affirmed.

Abbott vs. Tacoma Bank of Commerce, 175 U. S. 409-414.

Respectfully submitted,

ASA F. CALL,

Attorney for Defendant.

DEFENDANT'S ARGUMENT.

Supreme Court of the United States

JANUARY TERM, 1902.

NO. 164.

DANIEL H. TALBOT, PLAINTIFF IN ERROR,

vs.

FIRST NATIONAL BANK OF SIOUX CITY, IOWA.

In Error to the Supreme Court of the State of Iowa.

ASA F. CALL, SIOUX CITY, IOWA.

Attorney for Defendant.

As this cause has been quite fully stated in defendant's brief on motion to dismiss, it is not restated.

That brief also states most of the propositions on which we rely, and, therefore, these are not reargued at any length.

Plaintiff's right to sue depends entirely upon the Statute.

The general principle governing this case is found in the

fact that the suit is brought under section 5198 of the Revised Statutes for the recovery of a penalty.

The right to sue depends entirely on the statute, for such a right did not and does not exist without it.

It follows, as an elementary proposition, that every condition of the statute must be met or no cause of action arises.

A failure to meet the requirements or conditions of the statute cannot be excused on any ground without creating a cause of action not known to the law, and not contemplated by the statute.

The statute requires the existence of certain conditions before a cause of action is given. These requirements of the statute are,

First. Knowingly charging excessive interest by the lender.

Second. An actual payment of such excessive interest by the borrower.

Third. The commencement of suit to recover within two (2) years from the time the transaction occurred.

Each of these requirements acts as a limitation upon the right, and is a condition precedent to any recovery.

This rule of construction has been laid down by the courts in many analogous cases where new causes of action have been granted by statute.

In the case of The Harrisburg, 119 U. S., 199, on page 214, it is said:

"The statute creates a new legal liability, with the right to "a suit for its enforcement, provided the suit is brought within "twelve (12) months, and not otherwise. The time within

"which the suit must be brought operates as a limitation of the "liability itself as created, and not of the remedy alone. It is a "condition attached to the right to sue at all."

This case is followed in the cases of

Laidlow vs. Oregon Ry., 81 Fed., 879.
Saving Co. vs. Bear Valley Co., 89 Fed., 38.
Davis vs. Railway Co., 53 Ark., 127.
Atchison Ry. vs. Tanner, 19 Colo., 564.
Bartlett vs. Manor, 146 Ind., 627.
Lambert vs. Ensign Co., 42 W. Va., 817.
Williams vs. St. Louis Ry., 123 Mo., 583.
McCartney vs. Tyrer, 94 Va., 203.
Goodwin vs. Cunningham, 54 Neb., 16.

The facts in this case were found by a referee, and such findings, under the Iowa law and practice, have the same force and effect as findings of fact by a jury.

Lyons vs. Harris, 73 Iowa, 294.
Cooley vs. Osborn, 50 Iowa, 531.

The referee found against the Plaintiff on each of the three requirements of the Statute.

On the question as to whether the excessive interest was knowingly charged, the referee found that there was no intention

to charge more than the legal rate of ten per cent. That the error crept in through the methods of the bookkeeper of the bank in using three hundred and sixty days in the year instead of three hundred and sixty-five as a basis of computation, according to the custom of bankers.

(Record, page 127, fifth finding.)

On the question as to whether the plaintiff ever actually paid any excessive interest, the referee found against him, finding that such interest has never in fact been paid; that it was included in an overdraft by mistake, carried into notes and extensions, merged into bonds of the plaintiff, but was expressly excluded from judgment and decree on the foreclosure of those bonds.

(Record, page 128, eighth finding.)

On the question as to whether the suit was brought within two years from the time the usurious transaction occurred, the referee again found against the plaintiff, finding that the usurious transaction occurred more than two years prior to the commencement of this suit.

(Record, page 129, third finding.)

In addition to these three fatal findings, the referee also found that the question had been adjudicated in the foreclosure suit of the bank against the plaintiff

(Record, page 129, fourth finding.)

The Plaintiff's assignments of error do not raise any Federal law question, nor do they raise any law question of any character, but simply attack the findings of fact made by the Referee and affirmed by the Iowa courts.

One error assgned is that in the foreclosure suit of the defendant bank against the plaintiff, the defendant, now plaintiff, did not obtain the full measure of relief to which he was entitled under section 5197 of the Revised Statutes.

He now clams that he should have been entitled to a reduction of all interest on all of his obligations, instead of simply the interest on his overdrafts.

Without discussing the merits of plaintiff's defense in that suit, it is sufficient to say that he failed to appeal from the decree. It passed to final judgment, and it now stands as an unimpeachable adjudication.

It is an elementary proposition that a judgment of a competent court is not open to collateral attack.

Another assignment of error is that there was no adjudication of the present controversy in that foreclosure suit, for the reason that the full measure of relief to which this plaintiff was entitled was not then claimed in his defense.

The plaintiff's answer as defendant in that case is set out in this record, and it appears that the allegation was there made that illegal interest was charged by this defendant, amounting to a large sum, which was included in the notes upon which suit was brought for foreclosure, and a general prayer was made that an accounting be had to the end that a deduction of all overcharges of interest of every kind might be made.

(Record, page 120.)

This plea was certainly broad enough to enable the trial court to grant Talbot all the relief to which he was entitled, and it appears that the trial court not only deducted the trifling amount of overcharge of interest, but went further and deducted over two thousand dollars ($2,000) of interest, being all the interest, both legal and illegal, on his overdrafts.

Under a very familiar rule, the plaintiff is now estopped from again litigating this question.

In a further assignment of error the plaintiff complains of the ruling of the Supreme Court of Iowa in the alleged holding that the statute of limitations commenced to run from the giving of the bonds instead of the date of actual payment of excessive interest.

In this assignment of error the plaintiff errs in his conception both of the facts and of the ruling made. The Supreme Court of Iowa did not hold that excessive interest was paid by the giving of the bonds, but on the contrary did hold that no excessive interest was ever paid.

The suggestion of the court is that if Talbot's claim was correct, that he did pay excessive interest when he gave his bonds, that it was unavailing to him for the reason that such payment would be more than two years prior to the bringing of this suit, and, therefore, barred under the terms of the statute.

The decision of the Supreme Court of Iowa distinctly rests upon the proposition that no excessive interest was ever paid because it was expressly excluded from the judgment and decree of foreclosure, and, up to the time of the sale of the plaintiff's property, no payment had been made.

This finding of fact by the Supreme Court of Iowa is not

only conclusive upon this court but is based on the undisputed evidence.

The testimony of F. R. Gaynor, the judge who tried the case, was taken, and he testified: "It was ordered in making the decree that this excessive interest be deducted from the amount for which judgment should be ultimately entered, and I think it was at that time entered only for the amount that was found due after deducting this excessive interest, or this charge of interest upon overdrafts."

(Record, page 97.)

The testimony of S. M. Marsh, who was Talbot's attorney on that hearing, was also taken. Mr. Marsh also testified that this deduction of interest was made.

(Record, page 99.)

There was no attempt made to dispute this fact. The finding of the referee was based on undisputed evidence.

To avoid the conclusiveness of this finding Talbot urged that he paid the interest at some prior date by the giving of his notes or bonds. The Supreme Court of Iowa answered this theory by saying that even if it were true, his suit was not brought in time. But the court might have answered it in another way by saying that it was not true, for it is now well settled that a payment by notes or bonds, or the extensions of notes or bonds, is not a payment within the meaning of the statute.

This Court holds that the only way to pay a thing is to pay it.

McBroom vs. Scottish Investment Co., 153 U. S., 319.
Brown vs. Marion Natl. Bank, 169 U. S., 416.

In conclusion, we again submit that there is no question of law involved in this case. The questions raised by the plaintiff are simply questions of fact which are not now open to controversy. The findings of fact by the referee and the Iowa courts are conclusive upon this Court.

Respectfully submitted,

ASA F. CALL,
Attorney for Defendant.

Supreme Court of the United States.

No. 164.—October Term, 1901.

Daniel H. Talbot, Plaintiff in Error,
vs.
The First National Bank of Sioux City, Iowa.
} In error to the Supreme Court of the State of Iowa.

[April 14, 1902.]

This action was brought by the plaintiff in error in the District Court of Iowa, in and for Woodbury County, under section 5198 of the Revised Statutes of the United States, to recover twice the amount of interest alleged to have been due the defendant by the plaintiff on account of certain transactions had between it and the plaintiff. The District Court gave judgment against the plaintiff, and the Supreme Court of the State affirmed the judgment. The Chief Justice of the State allowed this writ of error.

The defendant in error was at the time of the transactions between it and the plaintiff a national bank. Plaintiff did business with it from January 1, 1886, until March, 1890, the instances of which are detailed in a pleading which occupies fifty-six pages of the record. During that time deposits were made by plaintiff with the bank, drafts were drawn by him, and his own and the promissory notes of others were given to the bank. Finally the transactions culminated according to the petition as follows:

"That on or about the 15th day of March, 1890, all of the indebtedness evidenced by said charges, account and notes then claimed by defendant against plaintiff was incorporated into certain bonds of that date made and executed and delivered by plaintiff to the Union Loan and Trust Compony of Sioux City, Iowa, as trustee for defendant, which said bonds were in the sum of $1,000 each, in all one hundred bonds, into which at that time and subsequently all of said indebtedness, except that represented by said note for $3,040.38, executed and delivered to the defendant on the 17th day of June, 1890, was merged. That said bonds were secured by mortgage on certain lands situated in the counties of Woodbury and Plymouth, in the Sate of Iowa. On or about the 3d day of March, 1892, a suit in equity was commenced in the District Court of Woodbury County, Iowa, and a judgment and decree was entered against plaintiff on or about the 23d day of December, 1893, for the sum of $94,578.90, being the entire indebtedness due from plaintiff to defendant as entered by said court upon the said bonds and said note for $3,040.38. And on the 19th day of March, 1894, upon the execution sale of the premises mortgaged to secure said indebtedness, the defendant knowingly took and received the entire sum of said judgment, including all the usurious interest before that time, knowingly charged in the said account for overdrafts upon all of the said notes and bonds, in all the sum of $47,020.37. That the items of interest upon the overdrafts aforesaid, charged upon account against plaintiff, were

so charged without any contract therefor, at the time of such charging were each and all at a higher rate of interest than that allowed by law of Iowa, corrupt and usurious, and in violation of sections 5197 and 5198 of the Revised Statutes of the United States. The items of interest upon overdrafts aforesaid, charged by defendant and carried into the notes aforesaid, were knowingly charged, contracted for by their incorporation in said notes, reserved, taken and received by the defendant as a part of the entire amount of interest paid by the plaintiff and knowingly received by defendant, in the total amount of money collected upon said judgment and decree, and knowingly charging, contracting, reserving, taking and receiving of which was a corrupt and usurious transaction, in violation of sections 5197 and 5198 of the Revised Statutes of the United States, and occurred within two years prior to the commencement of this action. That the entire amount of interest as aforesaid, knowingly charged, contracted for, taken and received was in amount the sum of $47,020.37, whereby defendant became indebted to plaintiff in the sum of $94,040.74, no part of which has been paid."

The answer of the defendant admitted substantially the allegations of the petition detailing the transactions between it and the plaintiff, but alleged that it charged plaintiff only the interest permitted by the laws of Iowa, "and that if at times, through the inadvertence or mistake of the clerks and accountants of the bank, the bank charged more than such proper rate, at other times, through similar inadvertence and mistake, a less amount was charged, so that during the course of its business with the plaintiff, the total amount charged to him as interest upon overdrafts was two thousand seventy-eight dollars and eighty cents ($2,078.80), while at the legal rate under the laws of Iowa, and according to the custom of bankers, there was due from the plaintiff to the defendant the sum of two thousand ninety-six dollars and sixty cents ($2,096.60), and there was no intention to charge usurious interest at any time."

The answer also admitted that all the unpaid indebtedness of plaintiff remaining was included in the bonds of plaintiff, which was secured by a mortgage upon his real estate as alleged, and that the mortgage was foreclosed and the property sold, but denied that any interest upon the overdrafts was paid by the sale, but averred "that before the rendition of the judgment and decree in the said foreclosure proceedings, the court ordered deducted from the amount found due all sums charged as interest upon overdrafts, which was in fact deducted, and such sums were not included in the judgment and decree, and the defendant denies that on the sale of the property of the plaintiff on the said judgment foreclosure, any of the sums of interest upon overdrafts were thereby paid, but on the contrary alleges that there is still a large deficit on the said judgment, amounting to about the sum of ten thousand dollars ($10,000), which was not paid by the sale of the said property, and has not since been paid."

The answer also alleged that if usurious interest was paid by the plaintiff "it was so paid more than two years prior to the time of the commencement of this suit, and therefore said suit is barred by lapse of time."

The answer also alleged a settlement between defendant and the plaintiff on the 17th of June, 1890, in pursuance of which the plaintiff delivered to the defendant $61,000 in the bonds already mentioned, and his promissory note for $3,048.38, and "that the said bonds and note were received by the defendant in full payment and settlement of all existing liability and indebtedness on the part of the plaintiff to the defendant, and thereby the plaintiff paid to this defendant all sums charged for interest or otherwise, and that the said settlement took place more than two years prior to the bringing of this suit, and this suit is therefore barred by limitation."

The answer also pleaded the foreclosure suit in bar.

The plaintiff filed a reply traversing the allegations of the answer.

The case was referred to a referee to report the facts. It is not necessary to give the report of the referee in full. He found that defendant had charged interest on plaintiff's overdrafts to the amount of $2,064, and that the average rate of interest charged was 10.22 per cent, and the total amount of interest charged in excess of 10 per cent was $72. That the interest on the overdrafts was included in the various notes given by the plaintiff prior to March 15, 1890; "and all of the indebtedness of plaintiff to defendant, arising or growing out of said bank account from January 1, 1886, to March 15, 1890, was evidenced by said notes, but said notes were not given in payment of said indebtedness."

The referee also found the execution of the negotiable bonds by plaintiff, and the mortgage to secure the same as alleged in the proceedings, the foreclosure of the mortgage, and that plaintiff, "in his answer and amendments in said case set up that excessive interest had been charged on overdrafts by the First National Bank, and said interest had been included in the notes afterwards given, and said notes were merged in the bonds in suit, and asked that an accounting be had of the amount of excessive interest charged on said overdrafts, and that the amount so found be deducted from the amount due on the bonds; and said D. H. Talbot, in support of his allegation, introduced evidence showing the amount of interest charged on said overdrafts; and in the determination of the case the court found that excessive interest on overdrafts to the amount of two thousand and sixty-four dollars ($2,064.00) had been charged the plaintiff, and ordered that said two thousand and sixty-four dollars ($2,064.00), with interest at the rate named in the bonds, amounting to five hundred ninety-five dollars and forty-six cents ($595.46), making a total of two thousand six hundred nine dollars and forty-six cents ($2,609.46), be deducted from the amount due on the bonds, and a decree was entered in said case for the amount due on said bonds, less said sum of two thousand six hundred nine dollars and forty-six cents ($2,609.46).

"Ninth. That in said cause a decree for ninety-four thousand five hundred seventy-eight dollars and ninety cents ($94,578.90) was rendered, of which forty-nine thousand seventy dollars and forty-seven cents ($49,070.47) was principal, thirty thousand nine hundred eighty-eight dollars and fifty-two cents ($30,988.52) was interest and fourteen thousand five hundred nineteen dollars and ninety-one cents ($14,519.91) was the amount paid on prior liens, taxes and interest on same by plaintiff in that action.

"Tenth. That the sheriff, under an execution issued on said decree, sold March 19, 1894, plaintiff's property, amounting to thirty-six thousand four hundred thirty-nine dollars and fifteen cents, ($36,439.15); and on May 19, 1894, under said execution sold property amounting to fifty thousand and sixty dollars, ($50,060,) and on July 2, 1894, sold under said execution property amounting to twelve hundred dollars ($1,200.00), making a total of eighty-seven thousand six hundred ninety-nine dollars and fifteen cents ($87,699.15) realized from sheriff's sale of said land under said decree, and leaving a balance, including the interest to date of sale, of eleven thousand one hundred forty-one dollars and five cents ($11,141.05) unpaid on said judgment and decree, which balance, with interest, has not been paid.

"Eleventh. That the interest on overdrafts, not having been included in said decree, was not paid by the sale of plaintiff's land under said execution.

"Twelfth. That plaintiff's overdrafts, including interest thereon, was paid June 17, 1890, more than four (4) years before the commencement of this action."

As conclusions of law the referee found as follows:

"First. That interest on overdraft was excessive, but not illegal, or usurious, and did not taint the subsequent debt, notes and bonds, of which it formed a part of the consideration.

"Second. That the custom of bankers to compute interest on a commercial busis of thirty days to the month, making three hundred and sixty days to the year, under the tables, is legal.

"Third. That plaintiff's cause of action occurred June 17th, and this suit is barred under section 5198 of the Revised Statutes of the United States, on which this action is based.

"Fourth. That the matter in this suit was adjudicated betwen the same parties in the case of the *Union Loan & Trust Company* v. *D. H. Talbot*, and that relief could have been granted, and plaintiff is now estopped from maintaining this suit.

"Fifth. That interest charged plaintiff on overdraft was not included in and did not form a part of the decree in the case of the *Union Loan & Trust Company* v. *D. H. Talbot*, and was not paid by said sheriff's sale of plaintiff's property under execution issued on that decree."

He recommended that judgment be entered dismissing plaintiff's petition, and that defendant have judgment for costs.

The plaintiff filed exceptions to the report, and the matter came on to be heard March 19, 1896, and the court adjudged that the conclusions of the referee were correct; that the matters in the suit had been adjudicated in the former action; that plaintiff's cause of action had accrued June 17, 1890, and that his suit was barred by the statute of the United States upon which the action was based, and plaintiff's petition was dismissed.

The Supreme Court of the State, in passing on the case, affirmed the findings of fact of the referee, but said "that it was entirely clear under the evidences that all interest charged on overdrafts in excess of six per cent was a greater rate of interest than was allowed by the laws of this State."

The court further said:

"We have seen that unless the plaintiff has paid the illegal interest he is not entitled to recover it in this action. If it may be said that the delivery of the sixty-one bonds on June 17, 1890, was a payment, this action is barred, as it was not commenced 'within two years from the time the usurious transactions occurred,' having been commenced March 8, 1895.

"The inserest on overdrafts was surely not paid by the sale of the land, for, as we have seen, it was not included in the decree. As we view the case, we think the illegal charges of interest have never been paid, and therefore the plaintiff is not entitled to recover in this action.

"IV. There is some dispute as whether plaintiff set up these charges of illegal interest in the action to foreclose the trust deed so as to constitute a former adjudication. That he set it up and that it was adjudicated we have no doubt. True, it was not set up with the same fulness and elaboration as in this case. Unquestionably it is matter which might have been plead in that case, and under a familiar rule the plaintiff must be held to have asserted all available defenses to that action.

"V. Said section 5198 provides that actions to recover back illegal interest paid must be commenced 'within two years from the time the usurious transactions occurred.' Now, whether or not we call the delivery of the bonds a payment, it is evident that the usurious transaction occurred on and before June 17, 1890, and it follows that this action is barred. These questions are so largely questions of fact and rest upon familiar and undisputed principles of law that we do not find it necessary to refer to any of the many authorities cited.

"The lower court was fully warranted in affirming the findings of fact as reported by the referee. While we do not concur in the conclusions of law that the interest on overdrafts was excessive, but not illegal or usurious, and that the custom of banks to compute interest on the commercial basis of thirty days to the month is legal, still it does not follow that the judgment of the District Court is erroneous.

"It is correct, notwithstanding the charge of illegal interest, because the plaintiff has never paid that interest, but has been allowed the full benefit of the facts in the foreclosure case and because this action was not brought within two years of the time the usurious transaction occurred."

The assignments of error present the following contentions: That the agreement of June 17, 1890, in pursuance of which the negotiable bonds of plaintiff were delivered to the defendant, did not constitute a payment of the interest on the overdrafts theretofore charged, but that the sales in the foreclosure suit May 19 and July 2, 1894, constituted such payment, and as the action was brought within two years from the latter dates, it was not barred; that the foreclosure suit was not *res judicata* because the defense of illegal interest was based upon the law of the State of Iowa, and not upon the Revised Statutes of the United States; that illegal interest was embraced in the judgment in the foreclosure suit; that the deduction which was made was only of the illegal interest on the overdrafts, and of no other interest; that the Revised Statutes directs "a forfeiture of the entire interest," not merely of the amount of interest paid in excess of

that allowed by law; that section 5198 provides that in case the greater rate of interest has been paid, the person so paying the sum "may recover back . . . the amount of interest so paid."

Mr. Justice McKenna delivered the opinion of the Court.

1. We are first confronted by a motion to dismiss the action on the ground that no Federal question was decided by the Supreme Court of Iowa. We think the motion should be overruled. The plaintiff explicitly based his right of action upon sections 5197 and 5198 of the Revised Statutes of the United States. The judgment of the trial court and of that of the Supreme Court of the State denied such right. (Sec. 709, Revised Statutes.) This court, therefore, has jurisdiction.

2. Section 5197 authorizes a national bank to charge the rate of interest fixed by the laws of the State in which the bank is doing business. The consequences of a charge in excess of such rate are expressed in section 5198 to be as follows:

"The taking, receiving or charging a rate of interest greater than is allowed by the proceding section, when knowingly done, shall be deemed a forfeiture of the entire interest, which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same; provided, such action is commenced within two years from the time the usurious transaction occurred."

Two cases are provided for (1) where illegal interest has been taken, received or charged; (2) where illegal interest has been paid. In the first case the entire interest which the "evidence of debt carries with it" shall be deemed forfeited. In the second case the person who has paid "the greater rate of interest may recover twice the amount of interest thus paid."

In what way is the statute available to plaintiff? Or, rather, in what way was it available when the foreclosure suit was brought and in what way is it yet available? Had illegal interest been paid by plaintiff at that time or had illegal interest been only charged by defendant? The latter is the contention of the plaintiff, and he controverts the position taken by the Supreme Court of Iowa, that the agreement of June 17, 1890, constituted a payment, and that the action was barred because not commenced within two years from that date. We may yield, *arguendo*, to plaintiff's contention, and thereby eliminate the statute of limitations from consideration. But nevertheless the judgment must be affirmed.

The plaintiff's situation, then, at the time of the foreclosure suit was that he was sued for illegal interest charged but not paid, and he entered a

defense to avoid its payment. He was successful. The court found that he had been charged illegal interest, and deducted its amount from the sum for which he was sued. In other words, judgment was rendered against him for the principal sum and legal interest. But he insists that such judgment was not the full relief to which he was entitled. To that judgment, he claims, he was entitled under the State law which he pleaded, but that under the statutes of the United States, which he could not plead, as he contends, he was entitled to a forfeiture of the entire interest, and as such forfeited interest was included in the judgment it was paid by the sale under the judgment of the property mortgaged, and a cause of action immediately arose to recover twice the amount of that interest so paid. We cannot assent to the contention. It is the interest charged, not the interest to which a forfeiture might be enforced, that the statute regards as illegal. And a forfeiture may or may not occur. Interest greater than the legal rate may be charged, but it may be relinquished and recovery be had of the legal rate. This was decided in *McBrown* v. *Scottish Investment Company*, (153 U. S. 318,) and repeated in *Savings Society* v. *Multnomah County*, (169 U. S. 416.) Those cases also decided that illegal interest ("the greater rate" the statute calls it) must be paid, to be recovered back. Indeed, it is a contradiction to say that interest may be recovered back which has not been paid, and whether it is relinquished before suit or deducted by order of the court before judgment, it is in neither case paid by the judgment or by the satisfaction of the judgment. The fact of payment of the illegal interest, the statute makes a condition of the recovery of its penalty. If there can be a substitute for such payment it cannot be found in the insufficiency of the pleading or the deficiency of the relief, in another action.

Judgment affirmed.

Mr. Justice GRAY took no part in the decision.

True copy.

Test:

Clerk Supreme Court, U. S.